

**EXHIBIT A**

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF PENNSYLVANIA

3  
4 CHECKPOINT SYSTEMS, :  
INC., :  
Plaintiffs :  
5 :  
vs. : 01-CV-2223 (PBI)  
6 :  
ALL-TAG SECURITY :  
7 S.A., ALL-TAG :  
SECURITY AMERICAS, :  
8 INC. and SENSORMATIC :  
ELECTRONICS :  
9 CORPORATION, :  
Defendants :

10  
11 Oral Deposition of NEIL D.  
12  
13 AUSTIN, was taken pursuant to notice, held at  
14 the offices of Pepper, Hamilton, Two Logan  
15 Square, Philadelphia, Pennsylvania, on  
16 Thursday, July 17, 2003, beginning at or about  
17 9:30 a.m., before Jeanne Christian, Court  
18 Reporter-Notary Public, there being present:

19 APPEARANCES:

20  
21 MONTGOMERY, MCCrackEN, WALKER  
& RHOADS, LLP  
22 BY: STEPHEN W. ARMSTRONG,  
ESQUIRE  
123 South Broad Street  
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24 Representing the Plaintiff  
25

1 APPEARANCES CONTINUED:

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9 Representing All-Tag Security  
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11 Americas, Inc.

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Electronics Corporation

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1 A. I need to ask you a privilege question.

2 MR. ARMSTRONG: Sure.

3 - - -

4 (Whereupon a short break  
5 was taken at this time.)

6 - - -

7 (Whereupon the court  
8 reporter read back the pending question.)

9 - - -

10 THE WITNESS: I have had a  
11 variety of discussions that I would refer --  
12 and have received, Checkpoint has received, in  
13 the course of those discussions, what I would  
14 refer to as opinions related to the '555  
15 Patent, and they have involved counsel in  
16 Switzerland and in the United States.

17 BY MR. BREINER:

18 Q. And how many opinions total?

19 A. I don't know how to answer your  
20 question. I'm confused whether if one person  
21 gives the same opinion twice, is that two?

22 Q. Let's talk then specifically about  
23 occasions, as opposed to conversations. These  
24 formal oral opinions were -- strike that.

25 When was the first formal

1 oral opinion that you received with respect to  
2 the '555 Patent?

3 A. That would have -- Checkpoint would have  
4 received that in the '97 range, I believe.

5 Q. And can you be more specific, beginning  
6 in '97, middle, end?

7 A. You are only asking about the formal, my  
8 description of formal versus informal?

9 Q. That's correct.

10 A. If you are asking about the formal, I  
11 don't have a time frame in '97 for that.

12 Q. Who did you receive the opinion from?

13 A. Various counsel in Switzerland who  
14 represented the company in the action of  
15 Checkpoint or Actron, Checkpoint, in the broad  
16 sense, against All-Tag and Sensormatic.

17 Q. And who was the person that gave you  
18 that opinion?

19 A. Francois Cover, patent counsel, and  
20 Lentz & Staley, our counsel of -- Doctor  
21 Lutz. What is his first name? Not Doctor.  
22 It is L-U-T-Z. And I can't think of the more  
23 junior person who was probably involved in the  
24 discussion.

25 Q. And what was that opinion that he gave

1 you?

2 A. That the product manufactured by All-Tag  
3 would be covered by the claims of the '555  
4 Patent in the United States similar to the  
5 coverage or coverage over the All-Tag product  
6 in Switzerland on the Swiss corresponding  
7 patent of the '555 Patent.

8 Q. And why did he give that opinion to  
9 you? What was the occasion or the  
10 circumstances that he was giving that opinion  
11 to you?

12 A. It was in the course of their  
13 representation of Checkpoint in its patent  
14 infringement suit against All-Tag and  
15 Sensormatic in Switzerland.

16 Q. Was the infringement suit started in  
17 1997?

18 MR. ARMSTRONG: You mean  
19 the one in Switzerland?

20 MR. BREINER: In  
21 Switzerland.

22 THE WITNESS: I believe it  
23 was a bit earlier than '97. It may have been  
24 -- I would be guessing. I believe it was in  
25 and around -- it was '96, '97 range, yes, I

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1 believe.

2 BY MR. BREINER:

3 Q. Would they have given you that same  
4 opinion before the lawsuit was filed in  
5 Switzerland?

6 MR. ARMSTRONG: Objection  
7 to the question. Under what circumstances?

8 MR. BREINER: The same  
9 circumstances, formal oral opinion.

10 MR. ARMSTRONG: You said  
11 would they have given it to you, which is  
12 conditional.

13 BY MR. BREINER:

14 Q. Did they give you this same opinion  
15 before the suit was filed in Switzerland?

16 A. No, I believe not.

17 Q. Did they give you an opinion that the  
18 Swiss patent, the counterpart to the '555, was  
19 infringed before the suit was brought in  
20 Switzerland?

21 A. Yes.

22 Q. Now, we have talked about that that was  
23 the first formal opinion that you recall in  
24 the '97 range.

25 What would be the second

1 one?

2 A. I believe there was another what I refer  
3 to as a formal, oral discussion opinion. My  
4 recollection is that the next one would have  
5 been some time around 1999 range.

6 Q. And who gave that opinion?

7 A. That would have been by the -- a patent  
8 lawyer in the firm of what is now Akin Gump,  
9 then would have been the Panage, Schwarzee,  
10 Jacobson, Adele firm.

11 Q. Who was the person that gave that  
12 opinion?

13 A. I believe it was Leslie Kasten is my  
14 recollection.

15 Q. Can you spell the last name?

16 A. K-A-S-T-E-N.

17 Q. Under what circumstances was he giving  
18 that opinion?

19 A. Based on discussions with me related to  
20 the -- I believe, by that point, the victory  
21 in the Swiss litigation.

22 Q. And what was the opinion that he gave?

23 A. That the All-Tag product infringed the  
24 various claims of the '555 Patent.

25 Q. And you have indicated this was in the

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1 '99 range. When in '99?

2 A. I don't recall specifics.

3 Q. Do you have any notes that may help  
4 refresh your recollection?

5 A. No. I place it in the '99 range --  
6 maybe just to help you out, this suit was  
7 commenced, I think, in May of 2001?

8 Q. That's correct.

9 A. I place it in '99 some time, because I  
10 was recommending to the company that the suit  
11 against All-Tag and Sensormatic be filed in --  
12 at that time, and that was approximately, --  
13 approximately, two years prior to the  
14 institution of this suit. But I have no  
15 better dating for that.

16 Q. And why were you recommending to the  
17 company that a lawsuit be commenced against  
18 All-Tag and Sensormatic?

19 MR. ARMSTRONG: I'm going  
20 to object to the question and instruct the  
21 witness not to answer any further questions on  
22 this subject on grounds of privilege.

23 BY MR. BREINER:

24 Q. Who was present besides you and Mr.  
25 Kasten when this opinion was rendered by Mr.

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1 Kasten?

2 A. No one.

3 Q. You indicate you were recommending to  
4 the company that suit be brought against  
5 All-Tag and Sensormatic.

6 Why wasn't a lawsuit  
7 commenced at this time?

8 MR. ARMSTRONG: I object  
9 and instruct the witness not to answer the  
10 question as beyond the scope of the subjects  
11 for which the witness is presented to testify  
12 and to the extent that the answer might  
13 involve any privileged information or  
14 communication.

15 BY MR. BREINER:

16 Q. Prior to this 1999 time range, did you  
17 ever recommend to the company that suit be  
18 brought against All-Tag -- strike that. Let  
19 me start again.

20 Prior to this 1999 time  
21 range that you are referring to, did you ever  
22 recommend to the company that suit be brought  
23 against All-Tag for infringement of the '555  
24 Patent?

25 MR. ARMSTRONG: I'm going

C E R T I F I C A T E

- - -

STATE OF NEW JERSEY :  
: SS  
COUNTY OF BURLINGTON :

I, Jeanne Christian,  
Court Reporter-Notary Public within and for  
Burlington County, Commonwealth of New Jersey,  
do hereby certify that the foregoing testimony  
of Neil D. Austin was taken before me at Two  
Logan Square, Philadelphia, Pennsylvania on  
Thursday, July 17, 2003; that the foregoing  
testimony was taken in shorthand by myself and  
reduced to typing under my direction and  
control, that the foregoing pages contain a  
true and correct transcription of all of the  
testimony of said witness.

  
JEANNE CHRISTIAN  
Notary Public

My Commission expires  
May 21, 2007

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 1 IN THE UNITED STATES DISTRICT COURT  
 2 FOR THE EASTERN DISTRICT OF PENNSYLVANIA  
 3  
 4 CHECKPOINT SYSTEMS, INC.,  
 5 Plaintiff  
 6 vs. Civil Action  
 7 ALL-TAG SECURITY S.A., 01-2223  
 8 ALL-TAG SECURITY AMERICAS, INC.,  
 9 and SENSORMATIC ELECTRONICS CORP.,  
 10 Defendants  
 11  
 12 Day 1 of Trial  
 13 January 29, 2007  
 14 Courtroom 9-B  
 15 Philadelphia, PA  
 16  
 17 Before THE HONORABLE PETRESE B. TUCKER, J.  
 18 and a Jury  
 19  
 20 APPEARANCES:  
 21 Dennis R. Suplee, Esq. For the Plaintiff  
 22 Thomas W. Hazlett, Esq.  
 23 Robert A. McKinley, Esq.  
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 Official Court Reporters  
 1234 U.S. Courthouse  
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 1 PROCEEDINGS  
 2 (After the panel was sworn by the courtroom  
 3 deputy, voir dire proceeded as follows:)  
 4 MR. SUPLEE: Good morning, ladies and  
 5 gentlemen. My name is Dennis Suplee and I'm one of the  
 6 lawyers involved in this case. And one thing which all  
 7 the lawyers agree this morning is that our objective in  
 8 asking you questions today is to try to get a jury that  
 9 can be fair to both sides.  
 10 I'm going to start by reading to you a very  
 11 short prepared statement that the parties have agreed  
 12 upon as to what this case is all about: Plaintiff  
 13 Checkpoint contends that defendants All-Tag Security  
 14 S.A, All-Tag Security Americas, Inc. and Sensormatic  
 15 have infringed and are infringing Checkpoint's patent by  
 16 selling and offering to sell in the United States what  
 17 are called deactivatable resonance labels that have the  
 18 same elements as the Checkpoint patent. In this  
 19 lawsuit, Checkpoint seeks a determination that  
 20 defendants have infringed the patent. Defendants deny  
 21 they have infringed or are infringing Checkpoint's  
 22 patent and also contend that the patent is invalid for  
 23 various reasons and that Checkpoint cannot enforce its  
 24 patent because of alleged delay by Checkpoint in  
 25 bringing this lawsuit.

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 1 APPEARANCES: (cont'd)  
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 13 Erik N. Videlock, Esq.  
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 15 3000 Two Logan Square  
 16 18th and Arch Streets  
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 18  
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 1 So I'm going to ask you a series of questions.  
 2 The objective is not to pry into your business but to  
 3 try to find out what we can about you that would be  
 4 helpful to the lawyers in seating a jury.  
 5 Knowing only those facts that I just read to  
 6 you, is there anybody here who would find it difficult  
 7 or impossible to resolve this case fairly?  
 8 Are you or any members of your family or  
 9 household an employee of Checkpoint?  
 10 Same question with respect to All-Tag Security  
 11 S.A.?  
 12 Same with All-Tag Security Americas, that is,  
 13 are you or any member of your family or household an  
 14 employee?  
 15 And finally Sensormatic, are you or any member  
 16 in your household or family employed by Sensormatic?  
 17 To your knowledge does your employer have any  
 18 business or other relationship with any of those  
 19 companies, that is, Checkpoint, the All-Tag companies or  
 20 Sensormatic? Or has it ever had such a relationship?  
 21 Do you or anybody in your family or household  
 22 have any business or other relationship with any of  
 23 these parties?  
 24 A JUROR: Can I ask a question? Is that using  
 25 the system?

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1 had back surgery for a ruptured disk.  
 2 THE COURT: We will strike her.  
 3 MR. SUPLEE: We have stricken two.  
 4 THE COURT: Two, 3.  
 5 MS. QUINN: 4, 5, 7, 8, 15, 28 and 30 is  
 6 what I have.  
 7 MR. SUPLEE: Can you read those again a  
 8 little slower.  
 9 MS. QUINN: 2, 3, 4, 5, 7, 8, 15, 28, 30 is  
 10 what I have. I don't know if anyone else has  
 11 anything.  
 12 MR. SUPLEE: I'm sorry to make your life so  
 13 hard.  
 14 THE COURT: Is that it?  
 15 The jurors need to eat, they have been here  
 16 since 8 or 8:30. We will break and give them until  
 17 2 o'clock.  
 18 MR. TILLERY: When we get back we will deal  
 19 with the motions?  
 20 THE COURT: You will pick them, then we will  
 21 deal with the motions that are outstanding.  
 22 MR. SUPLEE: Thank you, your Honor.  
 23 MS. QUINN: Thank you, your Honor.  
 24 (Luncheon recess)  
 25 AFTERNOON SESSION

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1 defendants All-Tag and Sensormatic did file a motion  
 2 to preclude the testimony of Checkpoint's expert  
 3 witness, Dr. Zahn, on the issue of infringement of  
 4 product two, that's made by All-Tag.  
 5 Product two is the product that All-Tag  
 6 currently makes as its commercial product. It is the  
 7 one it is selling today. It began making that product  
 8 in approximately April 2001.  
 9 And, Sensormatic has joined the motion, I  
 10 believe Mr. Tillery would like to argue it somewhat.  
 11 Your Honor, just as background, All-Tag has  
 12 made two basic products throughout its existence, one  
 13 is what we call product one, under one of its patents  
 14 we call the '466 patent, that product was made from  
 15 approximately the inception of the company in 1994 to  
 16 approximately April of 2001.  
 17 After that date they changed their  
 18 manufacturing process and made a different product,  
 19 which has different structure, that's what we have  
 20 been calling process two, product two made by another  
 21 patent of All-Tag, called the '342 patent. I said made  
 22 under the patents. It is generally, the general  
 23 process, not everything in there.  
 24 In this case we have provided to Checkpoint  
 25 in response to their discovery information on product

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1 THE COURT: Good afternoon. You may be  
 2 seated. We have our jury. I let them go home until  
 3 tomorrow morning because I figured it would be, rather  
 4 than watching the clock for purposes of the motions,  
 5 we can do the motions comfortably and then proceed  
 6 first thing tomorrow morning with the jury.  
 7 I received some motions filed recently by  
 8 Checkpoint to preclude certain testimony. So I guess  
 9 we will proceed to have argument on those motions.  
 10 There was no response filed to the motions so  
 11 I don't know that you were given an opportunity to  
 12 file a response.  
 13 MR. SUPLEE: We received it at 9:45 this  
 14 morning in the courtroom, your Honor.  
 15 If the Court would prefer, we would certainly  
 16 submit a writing. I think we can say more and better,  
 17 I hope, I can say it adequately today so that won't be  
 18 necessary and we can get a prompt start tomorrow  
 19 morning.  
 20 THE COURT: I don't think it would be  
 21 necessary.  
 22 Mr. Breiner.  
 23 MR. BRIENER: Thank you.  
 24 May it please the Court.  
 25 Your Honor is correct, this morning

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1 one information, on product two, we did that early in  
 2 the case.  
 3 We gave them on product two our patent  
 4 application, we gave them that with the scanning  
 5 electronmicroscope pictures that actually shows the  
 6 product, goes back to October of '92.  
 7 What happened in this case is we had expert  
 8 discovery and expert reports. We received  
 9 Checkpoint's expert report on June 1st of 2006. We  
 10 took their expert's deposition, Dr. Zahn on June 23,  
 11 2006.  
 12 At Dr. Zahn's deposition, he testified that  
 13 the only -- he testified he didn't know the All-Tag  
 14 process. He never saw it. His testimony was based on  
 15 seeing a videotape of the All-Tag process that was  
 16 produced by us, that was used in the first case before  
 17 the ITC.  
 18 He said he also looked at the '466 patent  
 19 that has been called the Pichl patents. He said he  
 20 reviewed a certain number of tags, they were  
 21 referenced in his expert report.  
 22 He testified that he did not review All-Tag's  
 23 second process generally used as the '343 patent, that  
 24 he didn't even know that All-Tag had a second process.  
 25 He said if there is more than one process, I

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1 don't know it. He said Checkpoint never told me that.  
 2 I reviewed what's in this report. He said all of  
 3 these exhibits to my report are pictures of the tags  
 4 that I reviewed, in which I have opined on. He opined  
 5 there was infringement.

6 Everyone of those tags he reviewed is product  
 7 one, he has never reviewed product two.

8 He doesn't know the process for product two.  
 9 He doesn't know the structure for product two.

10 The reason we brought this motion at this  
 11 point and time, your Honor, was we received the  
 12 Markman decision on June 23rd of last week. We looked  
 13 at that decision and we went the other way, but we  
 14 said, in order to streamline this case, let's concede  
 15 infringement on product one, process one.

16 We filed the proposed stipulation. We gave  
 17 it to counsel this morning.

18 And, part of the reason for, you know, the  
 19 Sunday activity on this was we did not review the tags  
 20 that Dr. Zahn had looked at until yesterday. We  
 21 wanted to do it on Friday or Thursday, because of  
 22 logistics, Dr. Zahn had the tags, they were only  
 23 available on Sunday. We reviewed them with a  
 24 representative from All-Tag, who is familiar with  
 25 really the circuit phase, you can tell the timeline.

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1 We reviewed those yesterday, we determined that every  
 2 one of the products that Dr. Zahn looked at was  
 3 product one. In fact, the majority of the products  
 4 that they looked at was or were tags from that, were  
 5 made by All-Tag, Switzerland not our product, All-Tag  
 6 Belgium. They are tags, that are not even a defendant  
 7 in this case. They were made prior to 1995. We saw  
 8 that, that's what prompted this motion.

9 This motion is in effect a Daubert motion.  
 10 As the Court knows is the gatekeeper to keep out  
 11 improper evidence.

12 It is our position if Dr. Zahn has never  
 13 examined product two, he has never examined process  
 14 two. He doesn't know what the structure is. There is  
 15 no way that he can come into this courtroom and opine  
 16 in front of the jury that All-Tag's product two and  
 17 process two infringes. It would be unfairly  
 18 prejudicial to All-Tag, it would taint the jury and  
 19 would cause endless confusion.

20 So it is our position, your Honor, as a  
 21 matter of law, he just cannot testify because he did  
 22 not look at the product.

23 In other words, in an infringement case the  
 24 plaintiff has to come forward and say we have an  
 25 expert. Our expert reviewed the product, and he

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1 compared it to the claims of the patent, to the  
 2 product and made a determination that's an  
 3 infringement. He can opine on infringement. He  
 4 hasn't done that.

5 So, it is our position he should be precluded  
 6 from testifying in this case on product two. That's  
 7 the gist of our motion, your Honor.

8 Based on our position, on our stipulation on  
 9 infringement of product one and process one, then no  
 10 evidence should come in on product one or process one  
 11 on their direct case.

12 If your Honor grants these motions, as we  
 13 respectfully suggest that you should, Checkpoint  
 14 doesn't have an infringement case, because product one  
 15 is out, subject to our defenses and then we lose on  
 16 those. We appeal.

17 Product two is out because they don't have  
 18 any witness that can testify as to product two. Every  
 19 one of the Checkpoint's employees testified, they  
 20 don't know what the All-Tag process is. They never  
 21 reviewed it for infringement. There is not a witness  
 22 to testify before that jury there's infringement on  
 23 product two.

24 Your Honor, we request that you enter an  
 25 order precluding Dr. Zahn from testifying as to

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1 infringement of product two.

2 One thing that Dr. Zahn did say, he said in  
 3 response to my question during his deposition, he said  
 4 I have never seen this patent that All-Tag makes, the  
 5 second process and I didn't base my report on,  
 6 subsequently to my deposition, I looked at it.

7 He said in response to redirect, it is my  
 8 opinion this patents doesn't change my opinion, my  
 9 expert report.

10 It doesn't change his expert opinion in the  
 11 report that product one infringes.

12 He said: I find that this patent that  
 13 All-Tag owns or is licensed under is an infringement  
 14 of the '555.

15 Well, your Honor, you don't infringe a  
 16 patent, you infringe a product. The patent has a  
 17 number of embodiments we cited in our brief.  
 18 One case, that's the Shertec case, a recent decision  
 19 by the federal circuit in September of 2006; that case  
 20 dealt with basically the same issue. It reversed the  
 21 Court, finding infringement on summary judgment,  
 22 saying that the plaintiff's expert, the patent owner  
 23 relied upon the fact that the alleged infringer said,  
 24 we practice our patent. The federal circuit said that  
 25 is not acceptable, it is not acceptable evidence.

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1 practicing and not using. So the fact that the patent  
2 is not being used does not in any way indicate that  
3 somebody is not going to attempt to enforce the patent  
4 if infringement takes place as defendants have pretty  
5 much stipulated took place in this case.

6 THE COURT: Well, let me just look at the  
7 other side and assume that the defense will argue that  
8 maybe that's correct if that is the only point or the  
9 only issue. But that issue taken along with whatever  
10 else the defense intends to show will enhance their  
11 defense.

12 MR. SUPLEE: But, your Honor, it's not really  
13 probative one way or the other. A company could decide  
14 to enforce it, they could decide not to enforce it  
15 whether they are using it or not using it. And beyond,  
16 that, with a jury trial, with a jury trial telling  
17 people, telling the jurors that the plaintiff does not  
18 practice the patent, the reaction, the typical guy on  
19 the street, that's who we have in the jury box, I mean  
20 guy in the generic sense, is going to think what is the  
21 harm. Then let these people do it. And that is what  
22 the Zenith case addresses, your Honor.

23 The appropriate focus here should be on the  
24 patent and on their product. And to try to get it in  
25 that way -- Mr. Tillery says, he doesn't say, well, if I

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1 That's the beginning and that's the end of it.

2 And even if your Honor were to say that maybe  
3 it could be relevant, teamed with everything else, the  
4 Zenith case says no.

5 THE COURT: Okay.

6 MR. BREINER: Cross fire. There are other  
7 reasons that's it's important as we outlined. It goes  
8 to our inoperativeness defense, the fact that they don't  
9 practice it. It goes to the commercial success on the  
10 factor for obviousness. It goes to the eBay factor if  
11 they are successful in this case. And I think to keep  
12 it from the jury is just unfair.

13 The jurors can determine what is right and  
14 what is wrong. They can listen to your instructions as  
15 to the law. To keep out that nobody is using this  
16 patent, including Checkpoint, I think would be  
17 prejudicial to us.

18 MR. SUPLEE: Well, how about we introduce the  
19 evidence of what happened in the Swiss litigation and we  
20 will let the jury sort it out because they are all so  
21 smart. You didn't let in --

22 Well, I don't need to tell you your job.

23 THE COURT: Okay. I will let you know first  
24 thing in the morning.

25 MR. TILLERY: Thank you, your Honor.

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1 add -- he says it's incredibly important. It's  
2 incredibly important because it's incredibly  
3 prejudicial.

4 MR. TILLERY: We don't disagree with the law.  
5 He can certainly make that argument. But he wants it  
6 the other way around. He wants the impression to be  
7 left that this is some key product of Checkpoint. It  
8 never has been and it never will be. It's an nuisance  
9 patent. And Lukas Geiges who was a Checkpoint employee  
10 said that within Checkpoint it was referred to as a  
11 nuisance patent, and that is what it is.

12 And you are entitled to argue that the law  
13 does not require you to practice it. That's fine. And  
14 I expect that you will do that. But to deny us the  
15 ability to tell the jury the truth, that no one on the  
16 planet has ever made a product embodying this patent is  
17 just wrong.

18 MR. SUPLEE: There is no claim that anybody at  
19 Checkpoint ever said to anybody at All-Tag this is a  
20 nuisance patent.

21 And beyond that, your Honor, it just doesn't  
22 have anything to do with the issue of equitable  
23 estoppel. And the main reason people want to get this  
24 on the table, the reason we're fighting about this so  
25 hard is because of the predictable effect on the jury.

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1 MR. BREINER: Thank you, your Honor.

2 MR. SUPLEE: Thank you, your Honor.

3 THE COURT: Thank you. Have a good evening.

4 THE COURTROOM DEPUTY: All rise.

5 (At 4:40 court was adjourned))  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16

## CERTIFICATE

17 We certify that the foregoing transcript is a  
18 true and accurate record of the proceedings in the  
19 above-captioned matter.  
20  
21

22 \_\_\_\_\_ Nancy O'Neill  
23 Date

24 \_\_\_\_\_ Sidney Rothschild  
25 Date

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHECKPOINT SYSTEMS, INC.,  
Plaintiff

vs. Civil Action  
01-2223

ALL-TAG SECURITY S.A.,  
ALL-TAG SECURITY AMERICAS, INC.,  
and SENSORMATIC ELECTRONICS CORP.,  
Defendants

Day 2 of Trial  
January 30, 2007  
Courtroom 9-B  
Philadelphia, PA

Before THE HONORABLE PETRESE B. TUCKER, J.  
and a Jury

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PROCEEDINGS

Good morning. You may be seated.

There are a couple of matters that were unresolved when we broke yesterday. One matter was the matter of whether or not the court would permit certain testimony in regard to the fact that Checkpoint does not practice the patent. The court will permit such testimony, so that the attorneys can conduct themselves accordingly.

On the issue of the motion to preclude Checkpoint from mentioning All-Tag product number 1, is there anything further on that? Because the court is prepared to resolve that motion?

MR. BREINER: We don't have anything more, your Honor.

THE COURT: The court will deny that motion.

I have passed out some proposed preliminary instructions to the jury. The instructions, while given to you in a packet, will not necessarily be given to the jurors in that fashion. They will be given a little differently, but substantively those are the instructions that will be given to the jury.

Do we have any questions or comments about the instructions?

MR. SUPLEE: Your Honor, plaintiff has some

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comments with respect to page 10.

THE COURT: Okay.

MR. SUPLEE: And starting from the bottom, we would suggest that the very last paragraph be deleted because the issue of correction is for the court and not for the jury. And I had understood that would be handled by the court at the conclusion of the trial by the jury.

THE COURT: Okay.

MR. SUPLEE: The only other suggestion, your Honor, is in the very first paragraph on the same page, and the second sentence begins, a patent may be invalid due to obviousness, and then we suggest that the words "lack of" be added, lack of enablement, and change inoperability to or operability. So the lack of enablement or operability, and before the word inventorship insert the word inaccurate.

Should I go through that again, your Honor?

THE COURT: Lack of enablement --

MR. SUPLEE: -- or operability. So instead of inoperability, and inaccurate inventorship.

MR. TILLERY: Your Honor, I concur with that except for inoperability is actually the word that's used in the case law, and they are different things. So you are talking about obviousness, lack of enablement,

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1 A. JUST TO MAKE IT ABSOLUTELY CLEAR THAT IT WAS A  
 2 THROUGH HOLE, I WAS ABLE TO PASS SOME WATER THROUGH THE  
 3 HOLE THROUGH THE LABEL, AND I MADE A LITTLE VIDEO OF  
 4 THAT TO HAVE ABSOLUTE PROOF THAT THERE WAS A  
 5 THROUGH HOLE.  
 6 Q. WHAT ELSE DID YOU DO?  
 7 A. OKAY. I RECEIVED A VIDEO OF THE ALL-TAG  
 8 MANUFACTURING PROCESS AND I VIEWED THAT.  
 9 Q. CAN I USE THE ABBREVIATION MFG FOR  
 10 MANUFACTURING?  
 11 A. THAT IS FINE WITH ME.  
 12 WITHIN THAT VIDEO, THEY TALK ABOUT THE  
 13 PROCESS TO CREATE THE DESIRED AIR GAP WITHIN THAT VIDEO.  
 14 Q. IN CASE YOU DID NOT SAY IT YET, I DON'T WANT TO  
 15 SAY YOU DID, DID YOU LOOK AT ANY U.S. PATENTS?  
 16 A. YES. WE DID MENTION THAT I LOOKED AT THE '466  
 17 AND THE '343 PATENTS THAT DESCRIBED THE ALL-TAG  
 18 MANUFACTURING PROCESS.  
 19 Q. THAT IS SEVEN. AND YOU REFERRED TO A FEW  
 20 STATEMENTS EARLIER TODAY. DO YOU RECALL WHAT THOSE  
 21 STATEMENTS WERE?  
 22 A. YES, THERE WAS THE PICHL STATEMENT, THE HOLT  
 23 STATEMENT AND THE ITC DETERMINATION THAT ALL INCLUDED  
 24 INFORMATION ABOUT THE ALL-TAG MANUFACTURING PROCESS.  
 25 Q. NOW, DR. ZAHN, DID YOU NEED TO LOOK AT ALL OF

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1 THESE TO COME TO YOUR CONCLUSIONS?  
 2 A. EACH ONE REINFORCED THE OTHER. WE ONLY NEEDED  
 3 ONE PROOF THAT THERE WAS A THROUGH HOLE THAT WAS A MEANS  
 4 FOR DEACTIVATION OF THE TAG. I DID IT 10 TIMES OVER AND  
 5 EACH OF THESE CASES VERIFIED THAT THAT WAS THE CASE IN  
 6 THE ALL-TAG TAGS.  
 7 Q. YOU REFERRED TO THE PICHL STATEMENT. DO YOU  
 8 REMEMBER WHO IS PICHL?  
 9 A. WELL, HE WAS THE REPRESENTATIVE FROM ALL-TAG.  
 10 Q. DO YOU KNOW FROM READING THIS, THE HOLT  
 11 STATEMENT, DO YOU KNOW WHO HE WAS?  
 12 A. I DON'T RECALL HIS RANK BUT HE WAS ALSO AN  
 13 EXPERT FROM ALL-TAG.  
 14 Q. ALL RIGHT, DR. ZAHN --  
 15 THE COURT: ARE YOU MOVING ON TO A  
 16 DIFFERENT AREA?  
 17 MR. MCKINLEY: YES, YOUR HONOR. I WAS  
 18 GOING TO GO DOWN EACH ONE OF THOSE ELEMENTS IN DETAIL.  
 19 THE COURT: I THINK THIS WOULD BE AN  
 20 APPROPRIATE TIME TO RECESS UNTIL TOMORROW MORNING. WE  
 21 WILL RECESS UNTIL NINE O'CLOCK TOMORROW MORNING.  
 22 MR. MCKINLEY: THANK YOU.  
 23 (JURY OUT.)  
 24 THE COURT: OKAY. YOU MAY BE SEATED. WE  
 25 WILL RECESS UNTIL TOMORROW MORNING AT NINE O'CLOCK. IS

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1 THERE ANYTHING THAT WE NEED TO PUT ON THE RECORD BEFORE  
 2 WE RECESS?  
 3 MR. BREINER: JUST ONE HOUSEKEEPING  
 4 MATTER. OUR LEGAL EXPERT, CARL JORDA, CALLED ME SUNDAY  
 5 NIGHT AND ADVISED THAT HE IS ILL. WE ARE GOING TO  
 6 SUBSTITUTE ANOTHER LEGAL EXPERT, MR. JAMES LABARRE. I  
 7 HAVE TALKED TO COUNSEL FOR CHECKPOINT. I DON'T BELIEVE  
 8 THEY HAVE AN OBJECTION, BUT I WANTED TO INFORM THE COURT  
 9 AND MAKE SURE THAT WAS ACCEPTABLE.  
 10 MR. SUPLEE: I THINK WE ARE PRETTY MUCH  
 11 OKAY ON THIS, YOUR HONOR. WE DO NOT OBJECT TO THE  
 12 SUBSTITUTION SO LONG AS THE WITNESS WHO WILL APPEAR WILL  
 13 SAY NOTHING MORE THAN WHAT JORDA WOULD HAVE SAID. I  
 14 GUESS THAT GOES WITHOUT SAYING.  
 15 THE SECOND THING IS, WE HAD A SCHEDULING  
 16 ISSUE ON OUR SIDE AS WELL THAT WE HAVE RAISED WITH THE  
 17 OTHER SIDE AND THAT IS, MR. DOWD IS AVAILABLE THIS WEEK  
 18 BUT NOT NEXT WEEK. AND SO THOUGH I WOULD NORMALLY CALL  
 19 HIM PROBABLY ON REBUTTAL BECAUSE WHAT HE WILL BE TALKING  
 20 ABOUT IS A MEETING IN 1999 WITH FOLKS FROM ALL-TAG, WE  
 21 WOULD LIKE TO CALL HIM AT THE END OF OUR CASE-IN-CHIEF.  
 22 AND MY UNDERSTANDING IS THAT DEFENDANTS DO NOT OBJECT TO  
 23 THAT, THOUGH THEY WANT AN OFFER OF PROOF. I HAVE SAID  
 24 WE HAVE ALREADY GIVEN THAT STATEMENT THAT WAS PROVIDED  
 25 TO THE COURT IS WHAT THE MAN WILL SAY. HE IS NOT GOING

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1 TO SAY ANYTHING MORE NOW THAN HE WOULD HAVE SAID IF HE  
 2 WERE CALLED LATER ON.  
 3 MR. BREINER: YOUR HONOR, AS YOU RECALL,  
 4 MR. DOWD WAS THE INDIVIDUAL WHO WAS NOT LISTED. I DON'T  
 5 RECALL THE OFFER OF PROOF BUT I THINK THAT SHOULD BE  
 6 ACCEPTABLE. IF WE HAVE A PROBLEM, WE WILL LET THEM  
 7 KNOW.  
 8 THE COURT: OKAY.  
 9 MR. TILLERY: MAY WE HAVE JUST AN  
 10 INDICATION WHERE THAT OFFER OF PROOF IS? I DON'T RECALL  
 11 THAT EITHER. IS IT JUST GOING TO BE THE SUMMER MEETING,  
 12 IS THAT IT?  
 13 MR. SUPLEE: WELL, I'M --  
 14 MR. TILLERY: I JUST DON'T RECALL GETTING  
 15 THAT, MR. SUPLEE.  
 16 MR. SUPLEE: WELL, I WILL TELL YOU WHAT I  
 17 WILL DO. WHETHER WE SENT IT BEFORE OR WE DIDN'T SEND IT  
 18 BEFORE, WE WILL SEND IT AT THE END OF THE DAY SO THERE  
 19 WON'T BE ANY ISSUE ABOUT IT.  
 20 MR. TILLERY: THAT IS FINE, YOUR HONOR.  
 21 WE WILL TAKE A LOOK AT IT. I DON'T THINK THERE WILL BE  
 22 A PROBLEM.  
 23 THE COURT: ANYTHING ELSE?  
 24 MR. BREINER: NO, YOUR HONOR.  
 25 MR. SUPLEE: YOU WANT US AT 9, YOUR

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1 HONOR?

2 THE COURT: YES. I THINK THE SOONER WE  
3 GET STARTED, THE SOONER WE FINISH.

4 MR. SUPLEE: THAT IS WHAT THEY SAY.

5 MR. TILLERY: WE ARE MAKING REAL

6 PROGRESS. WE ARE MOVING RIGHT ALONG.

7 MR. SUPLEE: BY THE WAY, DOWD CAN BE HERE

8 THURSDAY OR FRIDAY. TOMORROW IS WEDNESDAY, I DON'T

9 THINK WE WOULD -- I DON'T KNOW MAYBE WE WILL FINISH OUR

10 CASE ANYWAY. WE NEED TO TAKE DOWD INTO THE NEXT MORNING

11 THEN.

12 THE COURT: ALL RIGHT. HAVE A GOOD

13 EVENING. SEE YOU IN THE MORNING AT NINE O'CLOCK.

14 ALL COUNSEL: THANK YOU, YOUR HONOR.

15

16

17 WE CERTIFY THAT THE FOREGOING IS A

18 CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE

19 ABOVE-ENTITLED MATTER.

20

21 DATE OFFICIAL COURT REPORTER

22

23 DATE OFFICIAL COURT REPORTER

24

25 DATE OFFICIAL COURT REPORTER

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## PROCEEDINGS

MS. QUINN: I understand the plaintiff is going to call Mr. Olivier Boels from All-Tag as on cross in their case in chief, which is fine. I don't know what they intend to ask him. All I want to be certain of is that whatever topics they cover with him we will still be free to cover in our case in chief, that is, we don't have to address the entire subject matter in the plaintiff's.

THE COURT: No, you don't.

MR. SUPLEE: Just one other question if I may. In this type of case, would the court's practice be to let the jurors take their notes into deliberations?

THE COURT: Yes.

MR. SUPLEE: Okay.

(At 9:15 the jury entered the courtroom.)

THE COURT: Good morning, ladies and gentlemen. You may be seated.

Counsel.

MR. MCKINLEY: Thank you, your Honor.

DIRECT EXAMINATION (cont')

BY MR. MCKINLEY:

Q Good morning, Dr. Zahn.

A Good morning.

Q Just by way of a brief recapitulation of the events

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of yesterday to get us started today. Do you recall that the defendants have agreed that the All-Tag labels have the first three elements of claim 1 and claim 15?

A That's correct.

Q So the focus of your testimony today, what I would like to focus on is the fourth and final element of claims 1 and 15 in the '555 patent.

A Yes, sir.

Q Now, yesterday, you told us that there is no difference in the label that results from the manufacturing process in place before 2001 as opposed to the one that was in place after 2001, is that correct?

A That's correct.

Q Do you hold that opinion, Dr. Zahn, to a reasonable scientific certainty?

A Yes, and beyond that. It's very evident that they are identical in function.

Q And you also told us that the All-Tag labels had all of the elements in claims 1 and 15. Do you hold that opinion to a reasonable degree of scientific certainty?

A Yes.

Q Now, we ended the day yesterday with you listing out for the jury and the court the ten items that you looked at in forming the conclusions that you're

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1 testifying about today and have just so stated.  
 2 What I would like to do now is go through each  
 3 one of those in order and talk about what you did.  
 4 So, first, now that we have our list, we are  
 5 going to work through it. So let's discuss the tests  
 6 you say you conducted on All-Tag RF labels. First, Dr.  
 7 Zahn, where did you get the All-Tag labels that you  
 8 tested?  
 9 A I received them from a Checkpoint attorney, James  
 10 Cashel.  
 11 Q And was Mr. Cashel outside counsel for Checkpoint  
 12 or did he work for Checkpoint, do you know?  
 13 A I believe he was an outside counsel.  
 14 Q When did you receive those tags?  
 15 A Around February of 2004.  
 16 Q And in what form were they when you received them?  
 17 A I received a roll of All-Tag labels, a roll of  
 18 1,000 tags approximately. And then a few extra loose  
 19 ones of different sizes.  
 20 Q Can I please have plaintiff's exhibit 237.  
 21 MR. McKINLEY: Your Honor, may I approach the  
 22 witness?  
 23 THE COURT: Yes.  
 24 BY MR. McKINLEY:  
 25 Q Dr. Zahn, I hand to you what the envelope in any

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1 they can take a look at them?  
 2 THE COURT: Yes.  
 3 (Exhibit passed to the jury)  
 4 BY MR. McKINLEY:  
 5 Q Putting aside what you were told about what these  
 6 labels were when they were presented to you, Dr. Zahn,  
 7 how do you know that they were All-Tag labels other than  
 8 you had mentioned the tag, is there any other way you  
 9 knew?  
 10 A Well, you notice that tags have a serial number on  
 11 them, the 048572020000. And when I went to the All-Tag  
 12 website just to see what their product line was like,  
 13 they had this exact same serial number on their website.  
 14 Q Can you back up to a full zoom, please.  
 15 And this plaintiff's exhibit 235 that I have  
 16 put up, Dr. Zahn, what is that?  
 17 A This is a page off the All-Tag website.  
 18 Q Did you visit the All-Tag website and see the page?  
 19 A Yes, I did.  
 20 Q When was the last time you saw it?  
 21 A Yesterday.  
 22 MR. McKINLEY: I move plaintiff's exhibit 235  
 23 into evidence, your Honor.  
 24 THE COURT: Yes.  
 25 BY MR. McKINLEY:

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1 event will be marked plaintiff's exhibit 237. What is  
 2 this?  
 3 A This is the roll of approximately a thousand  
 4 All-Tag labels that I received. It's short a few from  
 5 the thousand because I took some for my testing.  
 6 Q Was there anything attached to that roll?  
 7 A Here are some other tags at the leading end of the  
 8 roll that I had taken off and the identifying label that  
 9 says these are All-Tag deactivatable 4 by 4 tags.  
 10 Q Since you received this roll from Mr. Cashel, and  
 11 putting aside when you provided it to counsel for the  
 12 court, has it been in your possession, custody or  
 13 control up until today?  
 14 A A hundred percent of the time.  
 15 MR. McKINLEY: I move plaintiff's exhibit 237  
 16 into evidence and ask permission to publish it to the  
 17 jury?  
 18 MR. BREINER: We object on authenticity and  
 19 lack of foundation.  
 20 THE COURT: Overruled. It will be admitted.  
 21 MR. McKINLEY: May I approach the witness and  
 22 get the labels back?  
 23 THE COURT: Yes.  
 24 MR. McKINLEY: And your Honor, I ask  
 25 permission if I may pass these around to the jury so

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1 Q May I please have plaintiff's exhibits 236 and 238  
 2 through 244.  
 3 Your Honor, may I approach?  
 4 THE COURT: Yes.  
 5 BY MR. McKINLEY:  
 6 Q Dr. Zahn, starting with exhibit plaintiff's exhibit  
 7 236, can you tell me what that is?  
 8 A These are the samples that I had processed and  
 9 examined from the All-Tag labels that I had received.  
 10 They are in these envelopes.  
 11 Q And when you say processed, Dr. Zahn, what do you  
 12 mean by that term?  
 13 A Well, since the main issue here is a throughhole  
 14 for the dielectric layer and the tags are covered with  
 15 both paper and aluminum, you can't visually see the  
 16 dielectric layer or the throughhole in its -- in its  
 17 full form. So I had to remove the paper and I had to  
 18 remove the aluminum to get down to the dielectric layer  
 19 so I can view it by either an optical microscope or an  
 20 electron microscope.  
 21 Q And can you remove one of the labels, please, and  
 22 and hold it up.  
 23 A I'm looking at the Checkpoint sample number 1.  
 24 Q I'm sorry, Dr. Zahn, did you say Checkpoint sample  
 25 number 1?

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1 A I'm sorry. I have got the envelope is labeled  
 2 Checkpoint, but it is sample number 1 from All-Tag.  
 3 Thank you.  
 4 And I put the sample on these yellow Post-its.  
 5 One, because the Post-its protect them by being put in  
 6 the envelope. I can remove the Post-it from the  
 7 envelope rather than the sample. The sample itself is  
 8 small and tends to adhere to surfaces. And also I can  
 9 label the Post-It with the sample numbers. Since all  
 10 the samples look alike, I make sure to never take more  
 11 than one at a time out of the envelope. And the  
 12 identifying number is on the Post-It. But if you sort  
 13 of bend the Post-It, you can take the sample off. So  
 14 here is sample number 1 of my testing. And this is just  
 15 of the dielectric layer.  
 16 Q And the envelope that you took that tag from, that  
 17 sample, can you read the designation on the envelope,  
 18 sample 1, is there any other identifying information  
 19 there?  
 20 A It's dated 3-23-04 and it's 4 by 4-d. The 4 by 4-d  
 21 matches the description. These are 4 centimeter by 4  
 22 centimeter dimension tags. The d means they are  
 23 deactivatable. And the 3-23-04 is the date that I first  
 24 would have put this in the envelope.  
 25 Q Is there a designation with the letter d on the

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1 envelope that was placed by counsel from your  
 2 deposition?  
 3 A Yes. There is a tag and exhibit number and it's  
 4 D-82. It has a date of 6-23-06. Has some initials. I  
 5 think it's BL.  
 6 Q And, Dr. Zahn, I think you said that in your  
 7 processing you had removed some of the other layers.  
 8 Yesterday you recall that we looked at several figures  
 9 that had a top conducting layer, a middle dielectric  
 10 layer and a bottom conducting layer. Which layer is  
 11 that that you have there in your sample?  
 12 A That's the middle dielectric layer.  
 13 Q Before we go any further. When you did your  
 14 processing -- and we'll get into the details of how you  
 15 removed those metal layers -- when did you place the  
 16 samples on the yellow Post-its?  
 17 A Well, it would be approximately after I had done my  
 18 optical microscope measurements which were approximately  
 19 March of 2004.  
 20 Q So it was never placed on a Post-It before you  
 21 examined the tags, is that right?  
 22 A I don't believe so. I think it was done after.  
 23 Q And the next tag in that exhibit, plaintiff's --  
 24 A I'm going to put this one back because I never take  
 25 out more than one at a time.

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1 Q What is the next tag in plaintiff's exhibit 236?  
 2 A It's what my labeling is sample #2.  
 3 Q And does it have any other identifying information  
 4 on the outside of the envelope?  
 5 A Well, it has exhibit numbered D-83. It has  
 6 initials perhaps RC or RL dated 6-23-06.  
 7 Q Okay. Before you take that sample out, Dr. Zahn,  
 8 the first sample you showed us, did that come from that  
 9 roll that we just looked at, plaintiff's exhibit 237?  
 10 A Yes, it did.  
 11 Q And this sample, the sample 2, did that also come  
 12 from that roll 237?  
 13 A Yes, it did.  
 14 Q Not to belabor the point of having you take each  
 15 one out of the envelope, Dr. Zahn, were all the labels  
 16 -- if you can just tick through all the labels in that  
 17 stack, were they all processed and do they all look  
 18 similar to the label that you did take out?  
 19 A Well, some of them I didn't process, and I would  
 20 have to go to, for example, my expert report identifies  
 21 exactly what was done to each and every label. Most  
 22 were processed down to the dielectric layer, but not  
 23 every single one was.  
 24 Q If you can take out sample 2, and let me know if  
 25 that was processed down to the dielectric layer.

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1 A Here is sample #2 (indicating), and it was  
 2 processed down to the dielectric layer.  
 3 Q Okay. Can you place that back in the envelope,  
 4 please.  
 5 And what is the next sample in plaintiff's  
 6 exhibit 236?  
 7 A It is sample number 3, exhibit D-84.  
 8 Q And did you process that label down to the  
 9 dielectric layer?  
 10 A It is somewhat tenacious. And sample number 3 was  
 11 processed down to the dielectric layer.  
 12 Q You can put that back in the envelope, please.  
 13 That's D-84.  
 14 And what is the next sample in plaintiff's  
 15 exhibit 237.  
 16 A Sample number 4. Exhibit number D-85.  
 17 Q Did you process that label down to the dielectric  
 18 layer?  
 19 A Yes, I did. There is the thin film, and it's  
 20 processed down to the dielectric layer.  
 21 Q Dr. Zahn, you stated earlier with respect to D-82  
 22 which is in plaintiff's exhibit 236 that that sample  
 23 came from the roll of tags that we passed around the  
 24 jury. How many samples did you take off that roll to  
 25 process?

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1 A I believe on the first time it was 17.  
 2 Q The four that you mentioned, samples 1, 2, 3 and 4  
 3 -- let me ask you this, doctor. Did you label the  
 4 samples, the 17 samples, sample 1 through sample 17?  
 5 A Yes, I did.  
 6 Q So the samples that have that designation on them,  
 7 sample 1, 2, all the way up to sample 17 will have come  
 8 from that roll that we looked at?  
 9 A That's correct.  
 10 Q What is the next sample, Dr. Zahn?  
 11 A Sample #5.  
 12 Q And although it's in plaintiff's exhibit 236,  
 13 sample #5, does it have any other designation?  
 14 A The exhibit number D-86. Now, this one is  
 15 different.  
 16 Q And how is it different, Dr. Zahn?  
 17 A This one was used for measurements in the scanning  
 18 electron microscope which requires it to be gold coated  
 19 with something like a 10 nanometer thin gold film on it  
 20 for proper operation with the electron microscope.  
 21 Q And before we get into those details, I want to be  
 22 clear. When you say it's different, what do you mean by  
 23 that?  
 24 A That it's gold coated.  
 25 Q Was the tag also a tag taken off the roll 237?

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1 A Yes.  
 2 Q So it's no different than the other tags; you are  
 3 speaking of a difference in the way you used the tag to  
 4 study it?  
 5 A That's correct.  
 6 Q We are going to discuss sample 5 a little bit  
 7 later.  
 8 How many more samples are in plaintiff's  
 9 exhibit 236, Dr. Zahn?  
 10 A Well, they go up --  
 11 Q Better yet, if you can just recite for the record  
 12 the sample numbers and just click through them.  
 13 A Okay. So we have already looked at samples one  
 14 through five. Shall I read the sample number and the  
 15 exhibit number?  
 16 Q Yes.  
 17 A So I have sample 6, exhibit D-88; sample 7, exhibit  
 18 number D-89; sample 8, exhibit number D-90; sample 9,  
 19 exhibit number D-91; sample 10, exhibit number D-92;  
 20 sample 11, exhibit number D-93; sample 12, exhibit  
 21 number D-94; sample number 13, exhibit number D-95;  
 22 sample number 14, exhibit D-96; and sample number 16,  
 23 exhibit number D-97; and sample 16 and 17 together in  
 24 one envelope, exhibit number D-87.  
 25 Q So that it would be fair to say that plaintiff's

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1 exhibit 236 contains the 17 samples that you processed  
 2 that came off of the roll from plaintiff's exhibit 237,  
 3 is that right?  
 4 A Samples 16 and 17 were intact tags, so they were  
 5 not processed down to the dielectric layer.  
 6 Q And why did you -- why were 16 and 17 not processed  
 7 down to the dielectric layer?  
 8 A Because I wanted to have a comparison with them  
 9 intact and where I was able to look down to the  
 10 dielectric layer, so I had some of each type.  
 11 Q Okay. So sample 16 and 17, if you can take those  
 12 out, please.  
 13 A Yes.  
 14 Q Okay. And they were -- I'm sorry, Dr. Zahn, can  
 15 you describe those samples again for me.  
 16 A Sample 16 was not gold coated. Sample 17 was gold  
 17 coated.  
 18 Q For purposes of your processing and observation?  
 19 A Yes.  
 20 Q You can place those back in the envelope, please.  
 21 I move plaintiff's exhibit 236 into evidence.  
 22 MR. BREINER: Same objection as before, lack  
 23 of foundation.  
 24 THE COURT: Overruled. They will be admitted  
 25 into evidence.

PAGE 16

00016

1 MR. MCKINLEY: I'm sorry?  
 2 THE COURT: They will be admitted into  
 3 evidence.  
 4 MR. MCKINLEY: Thank you.  
 5 THE COURT: Sure.  
 6 BY MR. MCKINLEY:  
 7 Q Dr. Zahn, can you describe what you did -- you  
 8 showed us about four or five samples, and I think you  
 9 said there're others. What did you do specifically to  
 10 process these labels down to the dielectric layer?  
 11 A Okay. So they were done one at a time. So I would  
 12 take one label. You can peel them off the translucent  
 13 paper with no problem at all. But they would remain  
 14 sticky. In the usual practical application, they would  
 15 stick to some object or merchandise. But they were hard  
 16 to deal with when they were sticky because they would  
 17 attach to anything. And then on the other side, on the  
 18 back side was where the serial number was on, and that  
 19 paper you could not remove with your fingers alone. It  
 20 was very sticky.  
 21 So I used ethyl acetate which basically  
 22 dissolves adhesive and put it into a beaker and let it  
 23 sit for about five minutes or so. And what would happen  
 24 is the paper would just lift off and float to the top.  
 25 So that made that very easy. And it would also remove

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00142

1 THE COURT: Okay, you may be seated.  
 2 Are there any issues that we need to talk  
 3 about before we recess until tomorrow morning?  
 4 MR. SUPLEE: Not from the plaintiff, Your  
 5 Honor.  
 6 MS. QUINN: Nor us, Your Honor.  
 7 THE COURT: All right. Well, have a good  
 8 evening. I will see you tomorrow morning at 9:00.  
 9 (Court adjourned at 3:00 pm.)

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00143

1 INDEX  
 2 WITNESS DIRECT CROSS REDIRECT RECROSS  
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 5 OLIVIER BOELS 96 124  
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 7 HUBERT PATTERSON 113  
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WE CERTIFY THAT THE FOREGOING IS A  
 CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE  
 ABOVE-ENTITLED MATTER.

DATE OFFICIAL COURT REPORTER

DATE OFFICIAL COURT REPORTER

DATE OFFICIAL COURT REPORTER

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SHEET 1 PAGE 1

0001

1 IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2  
3 CHECKPOINT SYSTEMS, INC.,  
4 Plaintiff

5 vs. Civil Action  
6 01-2223

7 ALL-TAG SECURITY S.A.,  
ALL-TAG SECURITY AMERICAS, INC.,  
8 and SENSORMATIC ELECTRONICS CORP.,  
9 Defendants

10 Day 4 of Trial  
February 1, 2007  
Courtroom 9-B  
Philadelphia, PA

11  
12  
13 Before THE HONORABLE PETRESE B. TUCKER, J.  
and a Jury

14  
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0003

PAGE 2

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PAGE 4

1 PROCEEDINGS

2 THE COURT: Good morning. You may be  
3 seated.

4 Are we ready for the jury?

5 MR. SUPLEE: We are, your Honor.

6 (At 9:20 a.m, the jury entered the courtroom.)

7 THE COURT: You may be seated. Good morning,  
8 ladies and gentlemen.

9 MR. HAZLETT: Your Honor, with the court's  
10 permission, Checkpoint would like to call Kevin Dowd now  
11 rather than in our rebuttal case because Mr. Dowd is not  
12 available next week.

13 THE COURT: You may.

14 KEVIN DOWD, sworn

15 DIRECT EXAMINATION

16 BY MR. HAZLETT:

17 Q Good morning, Mr. Dowd.

18 A Good morning.

19 Q Would you tell the jury where you went to college.

20 A Mount Saint Mary's College.

21 Q And when did you graduate from Mount Saint Mary's?

22 A 1970.

23 Q What was your degree in at Mount Saint Mary's?

24 A Political science.

25 Q Did you go to any graduate school after you

0004

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1 at in particular, paragraphs 69 and 730.  
 2 If you can zoom in on those, please.  
 3 Paragraph 69, you see it says: In  
 4 January 1993, at the National Retail Federation show  
 5 in New York, New York, Olivier Boels, who is All-Tag's  
 6 director of international sales brought with him from  
 7 Switzerland All-Tag deactivable resonant tags and  
 8 showed a sample of the tag to Kevin P. Dowd, you,  
 9 Checkpoint's executive vice president?  
 10 A. Yes.  
 11 Q. That was what you were talking about before, your  
 12 meeting with Mr. Boels?  
 13 A. Yes.  
 14 Q. A few months later. In paragraph 70. In  
 15 August 1993 Checkpoint placed an order through Customs  
 16 Securities Industry, Inc. CSI located in Canada for  
 17 23,000 deactivable resonant tags from All-Tag in  
 18 Switzerland, you see that?  
 19 A. Yes.  
 20 Q. CSI obtained the accused products from All-Tag and  
 21 CSI filled Checkpoint's order by importing into the  
 22 United States, 23,000 All-Tag deactivable resonant  
 23 tags on or about August 19th of 1992, you see that?  
 24 A. Yes.  
 25 Q. Sometime after that, Checkpoint filed this lawsuit

0054

1 We would like to also move that into  
 2 evidence.  
 3 THE COURT: Yes.  
 4 MR. TILLERY: Which number?  
 5 MR. HAZLETT: Plaintiff's Exhibit 25.  
 6 MR. TILLERY: Give us a moment to respond.  
 7 MR. HAZLETT: I'll turn things over to Mr.  
 8 Suplee.  
 9 MR. TILLERY: No objection, your Honor.  
 10 THE COURT: P-25 will be admitted.  
 11 MR. SUPLEE: With that, Judge Tucker,  
 12 Plaintiff Checkpoint rests.  
 13 THE COURT: Okay.  
 14 We will take a brief recess for the jurors.  
 15 (Jury leaves the courtroom.)  
 16 THE COURT: You may be seated. We have  
 17 something to put on the record before we proceed?  
 18 MS. QUINN: Your Honor, at this time we would  
 19 like to move pursuant to Rule 50 for directed verdict  
 20 as to plaintiff's claim for infringement for products  
 21 made after April of 2001, we have been referring to  
 22 its product as process two.  
 23 MR. TILLERY: We join in the motion in that  
 24 motion, in particular, refer the Court again to the  
 25 Shertec case, which we believe well establishes that

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1 in the ITC?  
 2 A. Yes.  
 3 Q. So the fact that All-Tag was only selling in your  
 4 view a relatively small number of tags in the early  
 5 '90s, didn't stop Checkpoint from suing All-Tag at  
 6 that time?  
 7 A. Yes.  
 8 MS. QUINN: Thank you.  
 9 MR. TILLERY: Nothing further, your Honor.  
 10 THE COURT: Okay.  
 11 MR. HAZLETT: Nothing further with this  
 12 witness, sir.  
 13 THE COURT: Thank you.  
 14 THE WITNESS: Thank you, your Honor.  
 15 (Witness leaves the witness stand.  
 16 MR. HAZLETT: Just tying up a couple of loose  
 17 ends.  
 18 First we would like to mark the copy of the  
 19 patent that the Court distributed on Monday as  
 20 plaintiff's exhibit 317 and move that into evidence.  
 21 THE COURT: Yes.  
 22 MR. HAZLETT: I think it was yesterday during  
 23 Dr. Zahn's testimony we looked at Plaintiff's  
 24 Exhibit 25, which is the All-Tag defendant's responses  
 25 to plaintiff's first set of admissions.

0055

1 an expert must in fact actually examine a product upon  
 2 which he or she is opining. Since Dr. Zahn admittedly  
 3 did not examine the product two, which was made after  
 4 April of 2001, his testimony is insufficient to  
 5 support a claim and therefore we should get a directed  
 6 verdict on that.  
 7 We also like to renew our motion for summary  
 8 judgment, equitable estoppel, laches and waiver, at  
 9 this time. And, we submit there are no material  
 10 issues of fact remaining under the circumstances of  
 11 what plaintiffs have presented here.  
 12 MS. QUINN: We join in that motion as well.  
 13 MR. SUPLEE: Your Honor, very briefly I think  
 14 Dr. Zahn's testimony with respect to the patent and  
 15 process used after 2001 was more than adequate to  
 16 satisfy the rules.  
 17 The Shertec case really has nothing to do  
 18 with the present situation. The problem with the  
 19 Shertec case, the fact it was not clear in that case  
 20 that the product was manufactured in accordance with  
 21 what the patent said. Here the testimony is clear  
 22 that the defendants say that the patent says what it  
 23 says and Dr. Zahn's testimony, I submit is more than  
 24 adequate. I think it was overwhelmingly convincing.  
 25 With respect to summary judgment on the

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0056

1 defenses. The defenses are up to the defendants.  
2 When they present them, we will respond to them. But,  
3 they are not in a position to get summary judgment at  
4 this juncture.

5 THE COURT: Okay. As it relates to the Rule  
6 50 motion, the Court will deny the motion. The  
7 testimony is sufficient at this point for us to  
8 continue this matter.

9 As to the defenses, the Court will deny the  
10 motion as well.

11 We will take a brief recess and we will  
12 proceed.

13 (Recess)

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4 PLAINTIFF'S WITNESS D C RD RC

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6 Kevin Dowd 3 10

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9 DEFENDANTS' WITNESSES

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11 Dominique Blicke 57 115 177 185

12 192

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15 CERTIFICATE

16 We certify that the foregoing transcript is a

17 true and accurate record of the proceedings in the

18 above-captioned matter

19

20 Date \_\_\_\_\_

21

22 Date \_\_\_\_\_

23

24 Date \_\_\_\_\_

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHECKPOINT SYSTEMS, INC.,  
Plaintiff

vs.

Civil Action  
01-2223

ALL-TAG SECURITY S.A.,  
ALL-TAG SECURITY AMERICAS, INC.,  
and SENSORMATIC ELECTRONICS CORP.,  
Defendants

Day 5 of Trial  
February 2, 2007  
Courtroom 9-B  
Philadelphia, PA

---

Before THE HONORABLE PETRESE B. TUCKER, J.  
and a Jury

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1 It is. But that's the purpose for which we are going to  
 2 be using it.  
 3 MR. SUPLEE: Your Honor, what it shows is  
 4 machines making tags. We know they have machines. We  
 5 know the machines make tags. That's all it shows. It  
 6 doesn't show anything about the characteristics of the  
 7 tags, which is what the case is all about.  
 8 MS. QUINN: Your Honor, that will come  
 9 separately through a separate witness. But there is a  
 10 product claim and a process claim in this case. And so  
 11 we would like the jury to know what the process is that  
 12 we used to make the tags.  
 13 MR. TILLERY: Your Honor, if I may, I don't  
 14 have a dog in this fight, but I might point out two  
 15 things. Number 1, defendant has already used a portion  
 16 of this, and all we are trying to do is to put in the  
 17 complete video.  
 18 And secondly, to the extent that Mr. Suplee is  
 19 concerned about the jury knowing that All-Tag is a small  
 20 company, Mr. Suplee himself elicited that testimony from  
 21 the All-Tag witness, so he already but that evidence on  
 22 the record. It's no surprise. It's nothing new.  
 23 MR. SUPLEE: In the first place, Mr. Tillery  
 24 is mistaken. We did not use any part of that videotape.  
 25 What we used was a different videotape prepared by

Page 3

## PROCEEDINGS

1  
 2 THE COURT: Good morning. You may be seated.  
 3 Mr. Suplee, I understand that you want to put  
 4 something on the record before the jurors are brought  
 5 out.  
 6 MR. SUPLEE: Yes, your Honor. I understand  
 7 that defendants -- that Ms. Quinn in her direct  
 8 examination of Mr. Boels is going to use defendant's  
 9 exhibit 433 which is a videotape of the All-Tag plant.  
 10 I didn't time it, your Honor, but I would guess it runs  
 11 10 to 15 minutes. And all it is is a tour of the  
 12 defendant's facility. It doesn't show one way or the  
 13 other whether there is a throughhole in the tag, and  
 14 it's not relevant to any issue in the case other than to  
 15 try to say to the jury we are a very little company and,  
 16 therefore, you shouldn't return a verdict against us.  
 17 THE COURT: Okay.  
 18 Ms. Quinn.  
 19 MS. QUINN: Actually, your Honor, it is  
 20 relevant because that is the means by which Mr. Boels is  
 21 going to explain the process through which All-Tag has  
 22 made its product since April of 2001. So it's not just  
 23 a nice little factory tour. It's showing the machines  
 24 that are used to make its tags.  
 25 I can't help that All-Tag is a small company.

Page 5

1 All-Tag as to how its product is manufactured.  
 2 And in the second place, there is no way in  
 3 looking at this videotape that you can tell whether  
 4 claim 1 or claim 15 is infringed. It just walks up and  
 5 down the corridors, shows the machines, shows a tree out  
 6 in front of the building.  
 7 And it's obvious that it has been mentioned  
 8 here that Checkpoint is big and All-Tag is small. But  
 9 we really don't need a 15-minute interlude to try to  
 10 reinforce that point for the jury. It is going to be  
 11 hard enough to put that aside as it is.  
 12 THE COURT: I'm going to permit the video.  
 13 It's going to be used in conjunction with testimony?  
 14 MS. QUINN: Yes, your Honor. Mr. Boels is  
 15 going to explain the process by which they make their  
 16 tags.  
 17 THE COURT: I'm going to permit it, and your  
 18 objection is noted.  
 19 MR. SUPLEE: Understood, your Honor.  
 20 I have alerted defense counsel when the jury  
 21 is first brought in, I would like to move into evidence  
 22 certain exhibits that I used during the  
 23 cross-examination of Mr. Blicek.  
 24 THE COURT: Okay.  
 25 MR. TILLERY: Your Honor, I apologize to the

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1 everything and we already sued, but --  
 2 Q Do you remember what they sued you for?  
 3 A Yes. This was regarding our patent via ITT  
 4 commission.  
 5 Q And did All-Tag win that lawsuit?  
 6 A Yes.  
 7 Q What was the effect of that lawsuit on All-Tag  
 8 Switzerland?  
 9 A But let's say I was happy and we were happy that we  
 10 won.  
 11 MR. SUPLEE: Objection.  
 12 THE COURT: Overruled.  
 13 You may proceed.  
 14 THE WITNESS: We were happy to won. But the  
 15 problem is we were running out of money because that  
 16 cost us a lot of money. And secondly, they have make a  
 17 lot of advertising about this court case. It was good  
 18 for me, but they have sent a letter to all the major  
 19 customer in Europe and in U.S., explain that All-Tag  
 20 existing, Mr. Boels existing. And they say to all their  
 21 customer, be careful, a new company called All-Tag  
 22 managed by Mr. Boels will come on the market and it is  
 23 not a good tag, blah, blah, blah.  
 24 It was good for me because in -- on their cost  
 25 they have make a very nice advertisement for our company

Page 23

1 because everybody -- all the major customer know us at  
 2 that time. It was free advertising. Thank you very  
 3 much. But in the other side, we were running out of  
 4 money because we have spent too much money in the court  
 5 case.  
 6 Q What happened to All-Tag Switzerland after the  
 7 court case?  
 8 A We were need money and -- because we were on the  
 9 out. And we have a good friend in Belgium was  
 10 interested to come in the company since we start because  
 11 he was thinking it's a good business. And at that time  
 12 I called him and say, if you want you can join us  
 13 because we need to increase -- put more money in the  
 14 company. And that's -- it was a strategy.  
 15 Q What was this person's name?  
 16 A It was Mr. Dominique Blicke that I know since many  
 17 years.  
 18 Q And so Mr. Dominique Blicke joined you?  
 19 A Yes, I invite him to come in Zurich. We have a  
 20 meeting there. And he decide to join us by putting more  
 21 money to pay different things we have to pay urgently.  
 22 Q And did you make any decisions to change the  
 23 company?  
 24 A Yes. At that time Mr. Blicke said to me I agree to  
 25 put some more money in this organization, but I would

Page 24

1 like to have more control with you. And he said that I  
 2 would like that we move -- we decide together that we  
 3 will move everything to Belgium. That mean we create a  
 4 new company in Belgium. We will buy the machine and  
 5 accessory of All-Tag Switzerland, and Belgium will be  
 6 run by me as the CEO.  
 7 Q Who was the CEO of All-Tag Switzerland?  
 8 A Mr. Pichl.  
 9 Q And so now All-Tag Belgium, you're going to be the  
 10 CEO?  
 11 A Yes, in '95. End of '95 create a new company and I  
 12 start as the CEO there.  
 13 Q How did Mr. Pichl react to you becoming the CEO?  
 14 A It was a big battle because it was -- he start the  
 15 company with me, but let's say he was the CEO and he was  
 16 older than me. He was not so happy about the decision,  
 17 but it was -- he have to accept that.  
 18 Q Did he continue to work with the new All-Tag  
 19 Belgium?  
 20 A He was not working on a day-to-day basis because he  
 21 was still living in Switzerland, and he was coming one  
 22 week per month to help us or to, let's say, to try to  
 23 make it better.  
 24 Q Where did you set up your factory in Belgium?  
 25 A We decide to put that 30 minutes from Brussels.

Page 25

1 It's an area where the land and everything is very  
 2 cheap. It was the right place to put. You are in the  
 3 middle of Europe, middle of the motorway, middle of the  
 4 highway. And let's see --  
 5 Q Did you buy an existing factory?  
 6 A No. We buy the land and we loan -- and we start a  
 7 new building, new factory.  
 8 Q And you say you bought the equipment from All-Tag  
 9 Switzerland?  
 10 A Yes.  
 11 Q Did Mr. Jorgensen do any work for All-Tag Belgium?  
 12 A Mr. Jorgensen follow me at that time. That means  
 13 we decide that we will make a new contract with him, a  
 14 new consultant contract.  
 15 Q So you sign a new consultant contract with Mr.  
 16 Jorgensen?  
 17 A Yes.  
 18 Q Does he still have his own business?  
 19 A He still continue his own business in Denmark, yes,  
 20 sure.  
 21 Q Does he still have other customers?  
 22 A He still have other customers, yeah.  
 23 Q When did All-Tag Belgium first start selling tags?  
 24 A Because we bought the machine, we moved the  
 25 machine, and the machine have been all in one week.

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1 That mean it was perceived to start immediately to  
 2 produce, and we have start -- we continued to sell while  
 3 -- or we start to sell at that time.  
 4 Q When did it first selling tags into the U.S.?  
 5 A '95.  
 6 Q Are you generally familiar with how All-Tag Belgium  
 7 makes its tags?  
 8 A I know mechanically what happen -- I'm sorry,  
 9 mechanically how they make their tags, yes.  
 10 Q Have you made the tags the same way since 1995?  
 11 A Yes.  
 12 Q Has there been any changes in the way you make your  
 13 tags?  
 14 A We have -- at that time we have improved a little  
 15 bit different thing regarding the machine and  
 16 everything. But we have continued on the same, yeah.  
 17 Q Did you still make your tags today the same way you  
 18 made them in 1995?  
 19 A No. We have changed many thing, and different  
 20 machine, and we use today another patent.  
 21 Q Can you explain to me what you mean?  
 22 A To the machine?  
 23 Q Well, I didn't understand. Have there been changes  
 24 from 1995 to today?  
 25 A Yeah, we change in 2001.

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1 Q And are you generally familiar with the way All-Tag  
 2 Belgium makes its tags today?  
 3 A Yes, I know how to run the machine.  
 4 Q So you know the machines generally?  
 5 A Yeah.  
 6 Q Do you have a video that shows the machines that  
 7 All-Tag uses to make its tags today?  
 8 A Yes, I can show you.  
 9 Q Who made that video?  
 10 A I make myself.  
 11 Q You made the video yourself?  
 12 A Yeah.  
 13 Q And the process that is shown in the video, how  
 14 long has All-Tag Belgium been using that process?  
 15 A The new process we started in 2001.  
 16 Q So is that the same process you used before 2001?  
 17 A No, it's a new process.  
 18 Q Is it different?  
 19 A It's a different process.  
 20 Q Different from what you used before 2001?  
 21 A Yes.  
 22 MS. QUINN: Your Honor, at this time we would  
 23 like to show defendant's exhibit 433, which is the video  
 24 that Mr. Boels just described.  
 25 THE COURT: Yes.

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1 MS. QUINN: Thank you.  
 2 BY MS. QUINN:  
 3 Q Mr. Boels, the gentleman back here is going to show  
 4 the video. And what I would like you to do, please, is  
 5 explain to us what we're seeing. And if you need at  
 6 some point to stop so you can explain something, you  
 7 tell us, or maybe I will stop to ask a question. But  
 8 this gentlemen back here will be running the machine.  
 9 A Okay.  
 10 Q Okay?  
 11 (Videotape was commenced)  
 12 What are we looking at here?  
 13 A This is the factory located outside Brussels. At  
 14 the beginning it was smaller than that. We have start  
 15 only with 12 thousand square feet. On the right side is  
 16 the administration department. And the factory today is  
 17 three times that. It's around 40,000.  
 18 Q It's about three times of when you started?  
 19 A Yes.  
 20 That would be the entrance. The  
 21 administration right and left.  
 22 Sorry. It's the first time I make a report  
 23 like that.  
 24 Q Now we are getting ready to go inside.  
 25 A Okay. We cross on the right side is my office and

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1 two secretary. On the left side is CFO and one  
 2 secretary.  
 3 This is all different machines. All the  
 4 machines are -- Sorry. All the machine are made by  
 5 ourselves.  
 6 Q All-Tag makes it's own machines?  
 7 A Yes. And now we go -- we will explain it's an  
 8 overall view of one part of the factory.  
 9 On the left side it's all the machine making  
 10 the deactivation process. And make the tag in life.  
 11 Q Make at alive.  
 12 A And we -- at the beginning we have only one  
 13 machine, now two machines, now we have eight.  
 14 Stop please. This is the basic material that  
 15 we use. That means it's sandwich of aluminum,  
 16 polypropylene and aluminum printed both sides by the  
 17 circuit.  
 18 Q Let me ask. So this is basically the sandwiche of  
 19 aluminum, polypropylene and aluminum?  
 20 A Yes.  
 21 Q Do you make this yourself?  
 22 A No.  
 23 Q You buy this from somewhere?  
 24 A Yes.  
 25 Q And is this what you sometimes refer to as web?

Page 140

1 Q You remember Mr. Suplee asking you some questions  
2 about letters from Sensormatic?  
3 A Yeah.  
4 Q Look again at plaintiff's exhibit 107, please. Do  
5 you remember him asking you about this letter?  
6 A Yeah.  
7 Q And if we could focus in on the second paragraph  
8 there. Take your time and read as long as you need.  
9 But do I understand correctly that in this  
10 letter Sensormatic was asking for more information about  
11 how All-Tag makes its products?  
12 A Yes.  
13 Q The letter talks about G4 and G5?  
14 A Yes.  
15 Q What is G4 and G5?  
16 A Because we try different -- we improve our machine,  
17 we have at one moment to design to make a reference  
18 because we improve our process, and it was a  
19 redistribution to give a name to something.  
20 Q So, at various points during the company, you're  
21 making improvements to the process?  
22 A Yeah.  
23 Q Who was making those improvements?  
24 A Mr. Jorgensen and -- R & D in the factory.  
25 Q And was Mr. Jorgensen working on making these

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1 that. And that's the reason why we give different name  
2 on that. And I didn't -- as I say, I didn't want to  
3 give secret regarding production or how to produce  
4 because we were afraid that maybe one day a competitor  
5 have a new idea different than buying the label from us.  
6 Q So, the processes we have been talking about, there  
7 is a process before April 2001 covered by one patent?  
8 A Yes.  
9 Q And a process after April 2001 covered by another  
10 patent?  
11 A Yes.  
12 Q But always improvements going on in between?  
13 A Yes. As any company improve what they are doing.  
14 Q So if somebody wanted to really understand what  
15 All-Tag -- how All-Tag makes its product, is it enough  
16 for them to know the patent?  
17 MR. SUPLEE: Objection.  
18 THE COURT: Overruled.  
19 THE WITNESS: Sorry. Repeat.  
20 BY MS. QUINN:  
21 Q So if somebody wanted to understand how All-Tag  
22 makes its product, is it enough to just read the patent?  
23 Does the patent tell you everything about how you  
24 actually make your product?  
25 A I believe. I think so.

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1 improvements to the process from the beginning of  
2 All-Tag Belgium?  
3 A Yes.  
4 Q So from the very beginning?  
5 A Yeah.  
6 Q And over time you gave the improvements different  
7 names?  
8 A Yes.  
9 Q G1, G2, G3?  
10 A Exactly.  
11 Q And so on.  
12 And so with Sensormatic, you said Sensormatic  
13 was both your customer and a competitor?  
14 A Yes.  
15 Q And you were comfortable telling Sensormatic that  
16 generally your process was covered by a patent?  
17 A Sure, they know that, and they have checked that.  
18 Q But what you didn't want to tell them was about the  
19 other improvements that you were making, is that right?  
20 A Yes.  
21 Q Okay. And why not?  
22 A Because we didn't change the process completely.  
23 We were -- would stay in the size of the patent. But we  
24 find different tools or different things to increase the  
25 speed of the machine and some different points like

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1 Q Then why didn't you want to tell Sensormatic about  
2 the improvements?  
3 A Because I think when you produce something you have  
4 some clever idea to do what the patent say.  
5 Q So there is the patent and there is also the  
6 improvements?  
7 A I think so, yeah.  
8 Q And those things together are how you make the  
9 product?  
10 A Exactly.  
11 MR. QUINN: Your Honor, at this time I think I  
12 neglected to move into evidence defendant's exhibits 434  
13 and 312. We would like to offer them at this time.  
14 THE COURT: 434 and 312.  
15 MS. QUINN: I have nothing further. Thank  
16 you.  
17 MR. TILLERY: Your Honor, I have some  
18 questions.  
19 THE COURT: Okay.  
20 MR. TILLERY: Can we have the exhibit 148.  
21 BY MR. TILLERY:  
22 Q Mr. Boels, this letter to you from Neil Austin,  
23 Vice President and General Counsel and secretary of  
24 Checkpoint is dated July 2, 1998. This Neil Austin, he  
25 is the same guy who threatened you with a lawsuit in

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1 If there is anything that you need me to  
 2 review, if you can get her a little early.  
 3 MR. TILLERY: We will do that.  
 4 THE COURT: Have a good weekend.  
 5 (Trial adjourned at 3:35 p.m.)  
 6  
 7  
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1 I N D E X  
 2 DIRECT CROSS REDIRECT RECROSS  
 3 OLIVIER BOELS 8 81 137 148  
 4 STUART SEIDEL 151 170 185  
 5  
 6  
 7

# CERTIFICATE

8  
 9  
 10  
 11 NANCY O'NEIL, SUZANNE WHITE, SIDNEY  
 12 ROTHSCHILD, being United States Court Reporters,  
 13 United States District Court, Eastern District of  
 14 Pennsylvania, do hereby certify that we are authorized  
 15 to and did report in shorthand, the above and  
 16 foregoing proceedings, and that thereafter our  
 17 shorthand notes were transcribed under our  
 18 supervision, and that the foregoing pages contain a  
 19 true and correct transcription of our shorthand notes  
 20 taken therein.

21 Done and signed this 2nd day of February,  
 22 2007, in the City of Philadelphia, County of  
 23 Philadelphia, State of Pennsylvania.  
 24  
 25

NANCY O'NEIL

SUZANNE WHITE

SIDNEY S. ROTHSCHILD

U.S. Court Reporters  
 United States District Court  
 Eastern District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHECKPOINT SYSTEMS, INC.,  
Plaintiff

vs.

Civil Action  
01-2223

ALL-TAG SECURITY S.A.,  
ALL-TAG SECURITY AMERICAS, INC.,  
and SENSORMATIC ELECTRONICS CORP.,  
Defendants

Day 10 of Trial  
February 9, 2007  
Courtroom 9-B  
Philadelphia, PA

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Before THE HONORABLE PETRESE B. TUCKER, J.  
and a Jury

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1 I hope we can reach a stipulation, but I don't  
 2 know if we can. I would like to raise the issue because  
 3 it's a factual matter that we would like introduced.  
 4 But I don't think it's appropriate to put All-Tag's  
 5 trial counsel on the stand.  
 6 MR. SUPLEE: Your Honor, the letter in  
 7 question was sent to James Cashl who is a lawyer at  
 8 Montgomery McCracken who represented Checkpoint before  
 9 we were in the case.  
 10 MS. QUINN: It was sent to Mr. Armstrong  
 11 actually.  
 12 MR. SUPLEE: Pardon?  
 13 MS. QUINN: It was sent to Mr. Armstrong.  
 14 THE COURT: Well, it was different counsel.  
 15 MR. SUPLEE: It was different counsel.  
 16 And counsel in that case for Montgomery, if  
 17 they are going to do this, then we want to get counsel from  
 18 Montgomery to come in here and say those tags were not  
 19 produced. So we object to the affidavit going in. I  
 20 haven't seen the affidavit before. And they think to  
 21 spring this at the last minute is just not fair.  
 22 They did give us the letter yesterday, but the  
 23 letter itself is not admissible obviously.  
 24 MS. QUINN: We would be happy to show the  
 25 affidavit. It just says what I just said, that

## PROCEEDINGS

1  
 2 THE COURT: Good morning. You may be seated  
 3 Mr. Breiner.  
 4 MR. BREINER: We have a couple of preliminary  
 5 matters which Ms. Quinn will address.  
 6 MS. QUINN: Yes. I will take the shorter one  
 7 first. I think we neglected yesterday to move into  
 8 evidence exhibit D-511, the demonstrative.  
 9 THE COURT: Okay.  
 10 MS. QUINN: We will do that now.  
 11 Next, your Honor, as an evidentiary matter,  
 12 Dr. Rose testified yesterday about certain All-Tag tags  
 13 that he reviewed. He had the envelopes, he identified  
 14 the tags by Bates number and identified them as  
 15 product 2, things made after 2001 in Belgium.  
 16 What we would like to get into evidence is the  
 17 fact that samples of those same tags were produced to  
 18 Checkpoint in 2002. The person with actual knowledge of  
 19 that happens to be Mr. Breiner. We don't think it's  
 20 appropriate to put Mr. Breiner on the stand subject to  
 21 cross-examination in the middle of a jury trial.  
 22 We have prepared an affidavit from him  
 23 attesting to the fact that counterparts of those tags  
 24 with those Bates number were produced to Checkpoint in  
 25 2002.

1 counterparts of those tags were produced.  
 2 THE COURT: Well --  
 3 MS. QUINN: If they want to call Mr. Armstrong  
 4 in here to testify, that's okay.  
 5 MR. SUPLEE: Well, I don't really see how they  
 6 get this in by affidavit. They need somebody to testify  
 7 about it.  
 8 MS. QUINN: Well, your Honor, that is why I  
 9 wanted to raise this now. The person with personal  
 10 knowledge is Mr. Breiner, which is really not seemly to  
 11 put trial counsel on the stand subject to  
 12 cross-examination.  
 13 MR. SUPLEE: Especially since he hasn't been  
 14 listed as a witness.  
 15 So, your Honor, I don't think this comes in.  
 16 This is not right to hit us with this at the last minute  
 17 and you have to get a "witness" who -- a witness in  
 18 quotations marks -- who was not on the pretrial  
 19 memorandum, not previously disclosed.  
 20 THE COURT: Let me suggest that you review the  
 21 affidavit and perhaps have some discussions as to  
 22 whether or not there can be a stipulation as to what the  
 23 attorney from Montgomery McCracken would testify to.  
 24 And that way you can get both of them if it comes in at  
 25 all.

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1 MR. SUPLEE: If it is going to go in, we are  
2 going to call the attorney from Montgomery McCracken and  
3 put him on the witness stand.

4 MR. TILLERY: We would look forward to cross  
5 examining Mr. Armstrong.

6 MS. QUINN: That would be fine, your  
7 Honor.

8 And it is unfortunate, trial is somewhat of a  
9 fluid thing. And as your Honor knows, it wasn't until  
10 just on the eve of trial that we were able to discover  
11 exactly what Dr. Zahn had examined. A lot of things are  
12 happening as facts are learned.

13 But now that we have determined what Dr. Zahn  
14 reviewed and what Dr. Rose reviewed and now that that is  
15 a live issue for this jury to consider, we think it's  
16 appropriate for the jury to know that Checkpoint had  
17 actual samples of these product 2 tags as early as 2000.

18 MR. SUPLEE: Well, we didn't have the samples  
19 as Mr. Cashl will testify. And counsel has known about  
20 these tags for months. They were produced at Dr. Zahn's  
21 deposition, so there is nothing fluid or new or anything  
22 like that.

23 If there is anything fluid or new, it's the  
24 defendant's position that there are two different  
25 products and that the '343 is different from the '466.

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1 MS. QUINN: That's a misstatement of  
2 discovery, your Honor.

3 THE COURT: Well, if you will pass up a copy  
4 of the affidavit to me and provide a copy to counsel.

5 MR. TILLERY: Your Honor, we were astounded  
6 that Dr. Zahn had not looked at the product. And we  
7 thought with Checkpoint checking the marketplace on a  
8 regular basis as they do, that they were perfectly aware  
9 of what product was out and had tested it and provided  
10 their expert with the correct tags. It's shocking that  
11 they did not.

12 MR. McKINLEY: Your Honor, we had a request  
13 for documents and things that specifically asked for  
14 them to identify the different products. I believe it  
15 was requested #54. And they referred us to documents  
16 under 33-d. Well, Dr. Rose testified yesterday that  
17 there are no documents that describe the product or the  
18 process that the tags are made by. So that request was  
19 completely improper and misleading to us.

20 At no time did counsel until June 16th of 2000  
21 did we learn that there were two distinct processes that  
22 were made and there was a line of demarcation in 2001  
23 between a process after that point and a process before.  
24 Everything else has been very mysterious to say the  
25 least.

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1 MR. TILLERY: Your Honor, I have here an  
2 actual copy of the letter that was sent to Mr.  
3 Armstrong, at Morgan & Finnagan who was my predecessor  
4 on behalf of Sensormatic, with enclosures by Federal  
5 Express. I have the Federal Express copy and I have the  
6 actual photocopies of the tags -- I'm sorry, the actual  
7 tags. So if Mr. Hugh (phon.) got a copy of the actual  
8 tags, certainly Mr. Armstrong got a copy of the actual  
9 tags. And if he didn't, because the letter says,  
10 enclosed are the items, the materials. It doesn't say  
11 photocopies. He got them because Christopher Hugh got  
12 them.

13 MS. QUINN: And, your Honor, I'm holding in my  
14 hand our response -- All-Tag's responses to Checkpoint's  
15 request number 54 in which three samples of resonant  
16 tags were requested, and we said samples would be  
17 produced. And that's back again in -- I have a date  
18 here -- back in '02, February 1 of '02.

19 MR. TILLERY: And if Mr. Armstrong didn't get  
20 what was referenced in the letter, one would have  
21 thought he would have raised holy hell and scream and  
22 write a letter and say where are they? That never  
23 happened.

24 THE COURT: Okay. I will let you know  
25 shortly.

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1 MS. QUINN: Thank you, your Honor.

2 THE COURT: Is there anything else?

3 MS. QUINN: At this time, your Honor, the only  
4 thing I would like to put on the court's radar screen,  
5 once we rest our case and get into the plaintiff's  
6 rebuttal case, our concern is that the plaintiffs not  
7 trying to reargue their infringement case through Dr.  
8 Zahn. I raise that now because Mr. McKinley, at the end  
9 of his examination of Dr. Rose, suggested that he was  
10 now going to go back to Dr. Zahn and ask about what  
11 happened in the dielectric layer, whether plastic melts  
12 or evaporates. That's their infringement case in chief.  
13 If they had something to say about that, they should  
14 have said it at the start. And so we have a motion  
15 outstanding on that.

16 I don't know whether it's an issue or not. I  
17 know Mr. Suplee would like to take it one step at a  
18 time, and that's appropriate. But Mr. McKinley's  
19 comments raised a real concern as to whether there is  
20 going to be an issue that is going to interrupt the flow  
21 of these proceedings.

22 MR. SUPLEE: There were a lot of things  
23 mentioned during the course of the defendant's case that  
24 we want to respond to, whether they bear on infringement  
25 or they bear on something else, including the question

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1 EXHIBITS TOGETHER DURING THE BREAK AND WE WILL DO IT  
2 THEN.

3 THE COURT: THAT'S FINE.

4 MR. BREINER: WITH THE EXCEPTION OF THE  
5 ISSUE WE RAISED THIS MORNING, YOUR HONOR, THAT CONCLUDES  
6 THE ALL-TAG CASE.

7 THE COURT: OKAY. WE ARE GOING TO TAKE A  
8 BRIEF RECESS.

9 THE CLERK: ALL RISE.  
10 (JURY OUT.)

11 THE COURT: OKAY. YOU MAY BE SEATED. ON  
12 THE ISSUE THAT WAS RAISED THIS MORNING, THE COURT IS  
13 GOING TO PERMIT THE EVIDENCE TO COME IN BY WAY OF  
14 AFFIDAVIT AND UNDERSTANDING THAT MR. ARMSTRONG WILL BE  
15 CALLED AS A WITNESS.

16 MR. SUPLEE: IT WILL BE MR. CASHEL WHO  
17 WAS WORKING WITH MR. ARMSTRONG.

18 THE COURT: WE WILL TAKE A BRIEF RECESS.

19 MS. QUINN: THANK YOU.

20 (BREAK TAKEN.)  
21  
22  
23  
24  
25

1 THE COURT: You may be seated.

2 MR. SUPLEE: Your Honor, there are a couple  
3 of things before the jury is brought in.

4 First of all in connection with the charge  
5 that was handed up to your Honor on inventorship this  
6 morning, we had previously requested a charge that  
7 documentary corroboration was required. The Court  
8 overruled that.

9 We have worked out what we have worked out  
10 with opposing counsel. I didn't want the substitution  
11 of this one to be taken as abandoning our request on  
12 our previous request.

13 The second thing is on Mr. Cashel, we want to  
14 get an affidavit from Mr. Cashel and put his affidavit  
15 in the record.

16 He was previously counsel for Checkpoint in  
17 this case and in fact has continued to work on the  
18 case during our tenure.

19 MR. TILLERY: This is different than what he  
20 said about 20 minutes ago, he was bringing him in to  
21 testify.

22 I would like an opportunity to cross-examine  
23 Mr. Cashel. Did he receive the letter? Did he read  
24 it? Did he understand it? If he didn't get the tags  
25 why didn't he call Mr. Breiner and ask for them? What

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1 else did he not do? Why did he not ask his client,  
 2 Mr. Mazoki, to go to the marketplace to get them?  
 3 I'm entitled to ask all of those questions,  
 4 if plaintiffs are going to argue to the jury that  
 5 their expert didn't examine the right tags because we  
 6 didn't give them to him; that sounds like what thy  
 7 will do.  
 8 THE COURT: At this point it is going to be  
 9 affidavit for affidavit. I'm going to permit that.  
 10 You can argue however you want to argue.  
 11 MR. TILLERY: So, your Honor, the plaintiffs  
 12 will be able to argue that their expert examined the  
 13 tags of another company, not the accused products of  
 14 the defendants and the reason that they examined the  
 15 wrong tags, they will have a man testify to the wrong  
 16 tags because we didn't produce them to them?  
 17 We got to explore that topic.  
 18 THE COURT: I don't know what the affidavit  
 19 is going to say.  
 20 MR. TILLERY: I don't know either.  
 21 THE COURT: I would assume that the attorney  
 22 is going to state he didn't receive the tags.  
 23 MR. TILLERY: What is he going to say?  
 24 THE COURT: You two can speak to one another  
 25 about it.

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1 MR. SUPLEE: Your Honor, the affidavit is not  
 2 here. We will have it after lunch. I'll show it to  
 3 counsel. I didn't see Mr. Breiner's affidavit until  
 4 it was handed to the Court this morning.  
 5 We will have it after lunch. We will submit  
 6 it and fair is fair.  
 7 MR. TILLERY: We will issue a trial subpoena  
 8 for Mr. Cashel and Mr. Armstrong and bring them in our  
 9 rebuttal case.  
 10 THE COURT: You may do whatever you think is  
 11 appropriate. He will object and I will rule.  
 12 MR. SUPLEE: That's the way that it works.  
 13 THE COURT: Yes.  
 14 MR. BREINER: Nothing is more difficult.  
 15 I have exhibit numbers for Mr. Mazoki. I  
 16 would like to put into evidence.  
 17 They are defendant's exhibits 215, 216, 217,  
 18 221, 223, 225, 330, 332, 352 and 415.  
 19 THE COURT: Okay.  
 20 MR. BREINER: The second issue on the jury  
 21 instruction, on the issue of obviousness, the parties  
 22 have reached an agreement.  
 23 What we propose that your Honor's instruction  
 24 at page 33, between the third and fourth paragraph, we  
 25 have language which we agreed to, can be put in

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1 talking about the motivation suggestion.  
 2 If I can pass that up. It is what is  
 3 highlighted in the yellow.  
 4 Thank you, your Honor.  
 5 THE COURT: Now, is there any other evidence  
 6 to be presented by All-Tag?  
 7 MR. BREINER: No, your Honor.  
 8 MS. QUINN: At this point it is just a  
 9 question of the affidavit. I suggest we reserve on  
 10 that until we get it all sorted out about lawyers  
 11 being subpoenaed.  
 12 THE COURT: Okay.  
 13 MR. TILLERY: Your Honor, we are prepared to  
 14 proceed. The only witness we will have in addition to  
 15 Mr. Engdahl that already testified out of order,  
 16 remember Mr. Engdahl, your Honor?  
 17 THE COURT: Yes.  
 18 MR. TILLERY: Mr. Patterson, Hubert Patterson  
 19 will testify by way of videotape and we will move  
 20 documents in evidence.  
 21 THE COURT: How long is the videotape?  
 22 MR. TILLERY: I believe it is a little less  
 23 than an hour.  
 24 MR. HAZLETT: There is some testimony in Mr.  
 25 Patterson's videotape, the position related to

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1 Checkpoint bringing suit against certain competitors.  
 2 The Court had ruled previously that sort of  
 3 testimony was admissible, but, so therefore we allow  
 4 - - agreed it could be played as part of the  
 5 videotape, but we do stand by that objection.  
 6 THE COURT: Very well.  
 7 MR. BREINER: One other issue. Mr. Suplee  
 8 made his objection on the inventorship instruction.  
 9 For the record, our position has been that the  
 10 testimony of Mr. Jorgensen will be sufficient for  
 11 corroboration.  
 12 We understand that your Honor wants more than  
 13 that. We want to make our objection noted also.  
 14 MR. TILLERY: We join in that, your Honor.  
 15 MR. SUPLEE: I don't know if now is the time.  
 16 I assume to the extent that the Court overruled our  
 17 other request for instructions, that we have an  
 18 exception or whatever for the record.  
 19 THE COURT: Absolutely. You will get an  
 20 opportunity at the conclusion of the instructions to  
 21 object and make any corrections or additions.  
 22 MR. SUPLEE: Thank you, your Honor.  
 23 (Jury in the box)  
 24 THE COURT: You may be seated.  
 25 MR. TILLERY: Your Honor, we would like to

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1 call by way of videotape deposition, Hubert Patterson.  
 2 Your Honor, we are beginning Sensormatic's  
 3 case. We remind the jury that my first witness was  
 4 Walter Engdahl. He already testified out of order.  
 5 THE COURT: You have done that.  
 6 We are moving into the Sensormatic case and  
 7 this is the second witness.  
 8 MR. TILLERY: Thank you, your Honor.  
 9 Proceed, please.  
 10 (The videotape deposition of Hubert  
 11 Patterson, played.)  
 12 (End of the videotape deposition)  
 13 MR. TILLERY: Your Honor, I have some  
 14 documents to move into evidence. Perhaps this is a  
 15 good time to do that.  
 16 THE COURT: Yes.  
 17 MR. TILLERY: On behalf of Sensormatic, we  
 18 would like to put in defendant's exhibits 230, 303,  
 19 defendant's Exhibit 381, defendant's Exhibit 415,  
 20 defendant's Exhibit 512 and defendant's Exhibit 513.  
 21 The last being two demonstrative -- being put in as  
 22 demonstrative not substantive evidence.  
 23 With that we are prepared to rest except for  
 24 the witnesses. We have trial subpoenas served as we  
 25 speak. We talked about previously depending on what

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1 happens with rebuttal, we want to bring those  
 2 witnesses back.  
 3 THE COURT: Okay.  
 4 MR. TILLERY: Otherwise Sensormatic rests,  
 5 your Honor.  
 6 THE COURT: To give counsel an opportunity to  
 7 discuss what we talked about earlier before All-Tag  
 8 rested, we will break now.  
 9 (Jury leaves the courtroom.)  
 10 MR. SUPLEE: Your Honor, if I may, we have  
 11 the affidavit of James D. Cashel, which I have handed  
 12 to other counsel. And if I could hand a copy to Mrs.  
 13 Asare.  
 14 I had forgotten if I ever knew that Mr.  
 15 McKinley had already secured an affidavit from Mr.  
 16 Cashel following opening speeches. And, that's why  
 17 the affidavit is dated January 29th to try to reduce,  
 18 even better, yet eliminate dispute, I would agree to  
 19 strike paragraph three from the affidavit.  
 20 MR. TILLERY: Your Honor, we object to this  
 21 affidavit. I would like to be able to cross-examine  
 22 this gentleman. This affidavit does not refer to the  
 23 letter in question of Mr. Breiner to Stephen  
 24 Armstrong. It is not from Stephen Armstrong but  
 25 someone else, Mr. Cashel, November 21, 2002 which

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1 refers specifically to the items. He doesn't say he  
 2 didn't have this, didn't receive it, anything like  
 3 that. I have to be able to cross-examine this  
 4 gentleman to determine whether or not the office  
 5 received this.  
 6 I have trial subpoenas to Mr. Cashel, Mr.  
 7 Armstrong, 30(b)(6) to Montgomery McCracken Walker &  
 8 Rhoads to determine whether or not they received it,  
 9 what they did, if anything or what they didn't do, if  
 10 anything when they did receive it.  
 11 I have the actual original tags here sent the  
 12 same time to prior counsel for Sensormatic, in New  
 13 York, Mr. Purview of the firm of Finnegan. They are  
 14 actual tags along with a copy of the actual letter,  
 15 the identical materials is not to Mr. Armstrong.  
 16 This affidavit doesn't refer to this at all.  
 17 I don't think they produced product 2. I have to be  
 18 able to cross-examine this gentleman to determine what  
 19 he did or didn't do, why.  
 20 MS. QUINN: I agree with that putting in an  
 21 affidavit from someone at Montgomery McCracken, even  
 22 is a different issue than we are talking about  
 23 All-Tag. It is improper to put All-Tag's counsel on  
 24 the stand subject to cross-examination in front of a  
 25 jury. This is a witness from another law firm, he has

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1 to something to say, he should be here to be  
 2 cross-examined.  
 3 MR. TILLERY: To resolve this, it is a sticky  
 4 issue with lawyers like this, we proposed that we will  
 5 all simply stipulate that all the All-Tag products  
 6 were available to all parties at all the times.  
 7 There is testimony that Checkpoint went out  
 8 to the marketplace and tested All-Tag tags. At any  
 9 time they could have gotten from customer are common  
 10 customers with All-Tag's, as they did on a regular  
 11 basis.  
 12 Counsel could have done it, if he didn't have  
 13 it, he could have filed a motion to compel if he  
 14 didn't have the right product. None of that was done  
 15 pure.  
 16 A simple stipulation would be acceptable to  
 17 the defendants, to the effect at the time that the  
 18 products, the accused products, which are the subject  
 19 of this proceeding were available to the parties.  
 20 MS. QUINN: If I may.  
 21 MR. TILLERY: That's true.  
 22 MS. QUINN: For our purposes it is true that  
 23 they were available, and I should note this is a live  
 24 issue that Mr. McKinley has said, in the presence of  
 25 the jury that All-Tag never identified different

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1 products before coming in this courtroom. That has  
2 been planted in the jury's mind that somehow it is a  
3 surprise that All-Tag has been selling different  
4 products.

5 We have to be able to address that.

6 MR. TILLERY: I'm sorry.

7 MR. SUPLEE: You are doing fine.

8 MR. TILLERY: Thank you.

9 Since it is not the kind of thing you want  
10 before a jury. Perhaps we can have these gentlemen  
11 testify and Mr. Breiner can be subject to  
12 cross-examination before your Honor. Your Honor can  
13 resolve this issue. It is really sort of being  
14 presented as a discovery issue never presented before.

15 But, it is not something appropriate for the  
16 jury for them to be able to argue based on this, that  
17 they didn't give our expert the right tags because we  
18 didn't produce them is just wrong.

19 MR. SUPLEE: Thank you, your Honor.

20 I would start and end with the proposition  
21 that fair is fair. If they can put in an affidavit,  
22 we should be able to put in an affidavit. Mr. Cashel  
23 was and is counsel for Checkpoint and has continued to  
24 work with us from time to time in getting this case  
25 ready for trial.

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1 In terms of saying the tags are out there in  
2 the marketplace, you could have purchased them and so  
3 on, they can do that. They can say to the jury they  
4 were out there, they could have purchased the tags.

5 But, in terms of what's the '343 patent,  
6 what's the '466 patent, it wasn't until June of this  
7 year that we knew that they were saying there were two  
8 different patents involved, but there was no claim,  
9 there were two different products.

10 MS. QUINN: June of last year.

11 MR. SUPLEE: Of course. It wasn't until then  
12 that they came up with this nomenclature of product 1,  
13 product 2. The only difference between the two patents  
14 is how you make the hole in the dielectric, that's all  
15 it is about.

16 If they want to say they knew in June that  
17 there was another patent out there, they should have  
18 asked us for tags or they should have gone out to the  
19 marketplace. They are free to say all of that kind of  
20 thing on the record as it now stands, but there's no  
21 need for a stipulation.

22 If you have Mr. Cashel come in at this point,  
23 it takes a last minute move by the other side and it  
24 makes it a great big issue just before the case goes  
25 to the jury. That's just not fair, your Honor.

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1 Meanwhile Mr. Tillery is making noises, that  
2 I should advise Montgomery McCracken that all of this  
3 can lead to a malpractice suit. He would certainly in  
4 fairness like them to be aware of it, would turn into  
5 a charade.

6 MR. TILLERY: I think it is very serious. I  
7 am serious about it.

8 THE COURT: On the issue of the affidavit,  
9 I'm going to permit the affidavit of Mr. Cashel and it  
10 is up to Mr. Suplee whether or not he wants to agree  
11 to a stipulation and if he doesn't want to, the Court  
12 is not going to force him to do that.

13 I think the state of this record as it stands  
14 now, defense is free to argue the availability in the  
15 marketplace. While it may not be -- I think  
16 factually, it is in evidence, it is available in the  
17 marketplace and you can take and run with it however  
18 you want, within reason.

19 MS. QUINN: My concern there are suggestions  
20 made by the counsel for Checkpoint that All-Tag had  
21 hidden from Checkpoint the fact we made different  
22 products over the years, it is wrong. Not only were  
23 the products out in the marketplace to find them, they  
24 got them in the course of this litigation, your Honor.

25 MR. BREINER: I want to correct Mr. Suplee.

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1 We provided at the same in November of 2002  
2 the actual patent application that matured into the  
3 '343 patent -- 2002, our first production of  
4 documents. When we gave them these tags, we also gave  
5 them the patent application that matured into '343  
6 patent. They took depositions. They never asked once  
7 about what this patent application was.

8 The first time we had any discovery request  
9 that we had to identify something was in March of  
10 2006, well before the June report. This is what Mr.  
11 McKinley put up on the screen, our request for  
12 admission, to say we produced our product generally  
13 under '466 or '343. Long before that.

14 So I want this record to reflect that we  
15 didn't do that, your Honor. We responded to discovery  
16 fully and completely throughout this case.

17 MR. SUPLEE: We have some disagreement about  
18 that, but --

19 MR. BREINER: The record will reflect that.

20 MR. SUPLEE: We disagree about that too.

21 But, your Honor, in my view it is not a great  
22 big deal in the case.

23 What matters is that they said that these  
24 tags are generally -- are made generally, according  
25 to -- as far as we are concerned, that's what the

<p style="text-align: right;">Page 89</p> <p>1 case is all about. I'm not going to stand up to tell  2 the jury we could not have gone here, there or the  3 other place to get the tags, whatever. I would lose  4 my credibility before I got started.  5 They have got everything they need to make  6 the argument that they need without turning the very  7 end of the trial into a distracting side show.  8 MR. TILLERY: Your Honor, perhaps this solves  9 the problem. If Mr. Suplee will agree, your Honor  10 will instruct that he not be permitted to argue to  11 this jury in any way, shape or form that his case is  12 somehow flawed because the defendants did not produce  13 a product to him that he and his expert could have  14 evaluated. I think that solves our problem but it  15 sounds like he wouldn't argue but now - -  16 MR. SUPLEE: I don't like being put into a  17 box, Mr. Tillery.  18 We will tell the jury what the facts are.  19 The facts in terms of the chronology, what happened  20 here is clear.  21 That to me is a distraction and I'm not  22 getting into distractions. I want to talk about what  23 the cases is really about which is the '466 and the  24 '343, the facts, they said it more than 300 times that  25 their products are generally - - are made generally</p>	<p style="text-align: right;">Page 91</p> <p>1 into that, you can't do this or that.  2 Before the trial started in the pretrial  3 conference, Mr. Tillery said he was not going to argue  4 to the jury that Checkpoint was litigious. Well,  5 here we are.  6 MR. TILLERY: I never once used the word  7 litigious before the jury. If you look it up, it  8 doesn't mean what you think.  9 I have the OED definition and you can see it  10 later.  11 Your Honor, I'm asking for an agreement or  12 instruction from the Court that this argument not be  13 permitted. If it is going to be permitted, I have to  14 have the opportunity to cross-examine the man that put  15 in the affidavit, that's only fair.  16 MR. SUPLEE: I can argue from what's in the  17 record. They can argue from what's in the record. If  18 one of us steps over the line, you will tell us to get  19 back on the other side of the line.  20 MR. TILLERY: I'm asked for the line to be  21 demarked, so there's no lack of clarity. I don't want  22 the jury poisoned, so that I have to get up in his  23 argument and object. I don't like to do that.  24 THE COURT: I think the basic problem is that  25 there is a disagreement as to what the facts are.</p>
<p style="text-align: right;">Page 90</p> <p>1 according to that.  2 You can't say that if there's an essential  3 element missing from the patent; that's what this case  4 is about.  5 MR. TILLERY: We have no problem with you  6 arguing that as strange as that argument is, we will  7 respond to it. If that is the argument, I have no  8 problem with that. I don't want this gentleman  9 standing before this jury and blame the flaws in his  10 case because the defendants did not give him the  11 accused product for his expert to examine the right  12 accused product. If he doesn't do that, I think we  13 solved the problem.  14 MS. QUINN: Mr. McKinley said that in open  15 Court in front of this jury yesterday, not until we  16 got here to Court, that All-Tag disclosed they make  17 different products; that's why it is an issue it was  18 put in the jury's mind.  19 MR. TILLERY: If he doesn't argue, it is  20 okay.  21 MS. QUINN: You can't unring a bell. There  22 you have it.  23 MR. SUPLEE: You will make your argument and  24 I'll make mine. You will make objections and Judge  25 Tucker will rule on both of them, I don't want to get</p>	<p style="text-align: right;">Page 92</p> <p>1 I think Mr. Suplee sees them in one way as  2 related to the tags, the defense in another way. It  3 is up to the jurors to determine what the facts are in  4 this case.  5 If the evidence that comes in that number  6 one, the tags are available in the marketplace, and  7 have been available in the marketplace.  8 Number two, there has been testing on  9 competitor's products.  10 Number three, that the tags were mailed,  11 whether or not they were received is an issue. They  12 were in fact mailed.  13 I think it makes it clear factually what can  14 be argued and what can't be argued.  15 I can't give him an advisory objection before  16 I hear - - advisory ruling from the Court before I  17 hear what he will say, if it is objectionable.  18 MR. TILLERY: I'll jump on it real quick when  19 I hear it.  20 THE COURT: I'm sure you will.  21 MR. TILLERY: If that is the case, I still  22 think it is only fair I have the opportunity to  23 cross-examine the gentleman that put in an affidavit  24 on this factual issue.  25 I need the cleansing power of</p>

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1 cross-examination to elicit the truth.  
 2 MR. SUPLEE: For heavens sake.  
 3 MR. TILLERY: This affidavit was drafted by  
 4 counsel, it refers to a memorandum that he did  
 5 regarding the subject, which was not attached or  
 6 provided. Who knows what that says. Who knows what  
 7 other documents exist. Who knows what he did or  
 8 didn't do. There are a bunch of questions I would  
 9 like to ask the gentleman on cross-examine to clarify  
 10 what he meant by this attorney created affidavit.  
 11 MR. BREINER: I sent a number of documents,  
 12 maybe 2,000 and they get 1,997, they just didn't get  
 13 the tags?  
 14 THE COURT: It says shortly after the  
 15 production was made, inventory of production and  
 16 generated work product in the memorandum.  
 17 After review of that memorandum and my  
 18 independent recollection of the events, he is saying  
 19 that All-Tag did not produce the RF labels.  
 20 MS. QUINN: We haven't seen that memorandum.  
 21 MR. TILLERY: This letter sent to them was  
 22 dated November 21st of 2002. He doesn't say, Steven  
 23 Armstrong of my office never received this or he  
 24 received it and only got photocopies, not the real  
 25 tags. He doesn't say anything about the document that

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1 we are talking about. He makes a general response  
 2 about it. It is not even the guy that received the  
 3 letter. It was addressed to Mr. Armstrong not Mr.  
 4 Cashel. I don't know who Mr. Cashel is or what he has  
 5 to do with this matter.  
 6 Armstrong was lead counsel for the case. He  
 7 is guy that was addressed. He is the guy that  
 8 received it. Where is he? I have a subpoena going to  
 9 him too. I don't know who Cashel is.  
 10 THE COURT: My suggestion is you have already  
 11 subpoenaed them. I think they should be brought in.  
 12 You can speak to them to so if you are satisfied.  
 13 I'll speak to them to see where we are going.  
 14 I don't think it is the kind of issue that  
 15 needs, I won't say distract the jurors because it is  
 16 an important factual issue, but I don't want it to be  
 17 blown up.  
 18 MR. TILLERY: I agree, your Honor, that's why  
 19 I offered two reasonable solutions. One to limit the  
 20 argument and/or a stipulation. Neither one of them is  
 21 acceptable. I'm open to other suggestions as well.  
 22 THE COURT: I think the important thing to  
 23 see where we stand, when the people come in to tell us  
 24 what actually occurred.  
 25 MR. TILLERY: Perhaps we can do that outside

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1 of the hearing of the jury.  
 2 THE COURT: That would be fine.  
 3 MR. SUPLEE: Perhaps.  
 4 THE COURT: Okay.  
 5 MR. SUPLEE: We will not close today.  
 6 MR. TILLERY: We would prefer that Mr. Suplee  
 7 relax over the weekend and gather this thoughts as  
 8 well.  
 9 THE COURT: At the rate we are going it will  
 10 probably be too late in the afternoon.  
 11 MR. SUPLEE: Probably Tuesday, your Honor.  
 12 MR. TILLERY: I want him fresh anyway.  
 13 THE COURT: Well, Tuesday we are supposed to  
 14 have a snow storm.  
 15 MS. QUINN: We will talk fast on Monday.  
 16 THE COURT: We will recess to 1:30.  
 17 MS. QUINN: Thank you.  
 18 MR. BREINER: Thank you.  
 19 (Luncheon recess)

1 AFTERNOON SESSION

2 THE CLERK: ALL RISE

3 THE COURT: GOOD AFTERNOON.

4 MR. TILLERY: YOUR HONOR, I HAVE SOME  
5 GOOD NEWS FOR THE COURT. MR. MCKINLEY AND I WERE ABLE  
6 TO DO SOME SHUTTLE DIPLOMACY AMONGST OURSELVES HERE  
7 WITHOUT EVEN HENRY KISSINGER GETTING INVOLVED. WE HAVE  
8 A STIPULATION THAT WILL RESOLVE A STICKY PROBLEM.

9 THE STIPULATION IS THAT NEITHER PARTY  
10 SHALL ARGUE TO THE JURY THAT DEFENDANTS DID OR DID NOT  
11 PRODUCE THE ACCUSED ALL-TAG PRODUCTS TO PLAINTIFF IN  
12 DISCOVERY. AND THAT WOULD INCLUDE THE AFFIDAVITS OF MR.  
13 CASHEL AND MR. BREINER NOT BE PUT INTO EVIDENCE SO I  
14 DON'T KNOW IF THEY ACTUALLY MOVED OR NOT.

15 THE COURT: NO.

16 MR. TILLERY: WE WANT TO MAKE SURE THAT  
17 THEY ARE NOT.

18 THE COURT: THEY WERE NOT.

19 MR. TILLERY: IF THAT IS ACCEPTABLE TO  
20 YOUR HONOR, I BELIEVE THAT IT IS ACCEPTABLE TO ALL  
21 PARTIES.

22 MR. MCKINLEY: YES.

23 THE COURT: IT IS ACCEPTABLE TO THE COURT

24 MS. QUINN: IT'S ACCEPTABLE TO US AS  
25 WELL, YOUR HONOR.

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<p>1 MR. BREINER: IT'S ACCEPTABLE TO ME, YOUR 2 HONOR. 3 MR. TILLERY: THANK YOU, YOUR HONOR. 4 MS. QUINN: AND YOUR HONOR, ONE MORE 5 HOUSEKEEPING MATTER BEFORE WE BEGIN. 6 I UNDERSTAND WE MIGHT NOT HAVE MOVED INTO 7 EVIDENCE DEFENDANT'S EXHIBIT 115 AND 149. WE WOULD LIKE 8 TO DO THAT AT THIS TIME. 9 THE COURT: 115. 10 MS. QUINN: CORRECT, 115 AND 149. 11 THE COURT: OKAY. 12 (DEFENSE EXHIBITS 115 AND 149 ADMITTED 13 INTO EVIDENCE.) 14 MR. TILLERY: YOUR HONOR, ON THAT POINT 15 THE GENTLEMAN THAT I MENTIONED FROM MONTGOMERY MCCrackEN 16 WILL NOT BE SUBPOENAED AND IF THEY WERE GOING TO COME 17 IN, WE DON'T NEED THEM. 18 MR. MCKINLEY: THE SUBPOENAS WERE NOT 19 SENT? 20 MR. TILLERY: THEY WERE GOING TO BE 21 SERVED MOMENTARILY, SO IT'S SHUT DOWN. IT'S NOT 22 NECESSARY. 23 MR. MCKINLEY: OKAY. 24 THE COURT: OKAY. I GUESS MISS QUINN, 25 TECHNICALLY, EITHER YOU OR MR. BREINER WOULD HAVE TO</p>	<p>1 Q. AND JUST BY WAY OF REMINDER, YOU HELD THE 2 POSITION OF GENERAL COUNSEL FOR CHECKPOINT? 3 A. YES. 4 Q. COULD YOU REMIND US WHAT YEARS THAT WAS? 5 A. FROM JUNE OF 1989 UNTIL JULY, 2003. 6 Q. THE LAST TIME YOU WERE HERE YOU TESTIFIED ABOUT 7 YOUR ROLE IN CHECKPOINT'S ACQUISITION OF ACTRON AND THE 8 '555 PATENT? 9 A. YES. 10 Q. BUT LET'S MOVE ONTO SOME OTHER THINGS. 11 DID YOU KNOW LUKAS GEIGES? 12 A. YES. 13 Q. DID HE WORK FOR CHECKPOINT FROM APPROXIMATELY 14 1994 TO 1998? 15 A. YES. 16 Q. ARE YOU FAMILIAR WITH THE CIRCUMSTANCES OF THE 17 TERMINATION OF HIS EMPLOYMENT AT CHECKPOINT? 18 A. YES. 19 Q. COULD YOU TELL US WHAT HAPPENED? 20 A. MR. GEIGES, I GUESS IN MID JULY OF 1998, WAS 21 ADVISED BY THE CHIEF EXECUTIVE OFFICER THAT HIS SERVICES 22 WERE BEING TERMINATED AS A RESULT OF A REDUCTION IN 23 COSTS, IF YOU WILL. 24 Q. AND WHAT HAPPENED THEN? 25 A. SHORTLY THEREAFTER, DURING THE COURSE OF AN</p>
Page 98	Page 100
<p>1 REST IN FRONT OF THE JURY. I DON'T KNOW THAT WE DID 2 THAT. 3 MS. QUINN: I BELIEVE MR. BREINER DID, 4 YOUR HONOR. 5 THE CLERK: ALL RISE. 6 (JURY IN.) 7 THE COURT: GOOD AFTERNOON, YOU MAY BE 8 SEATED. 9 LADIES AND GENTLEMEN, THE DEFENDANTS HAVE 10 RESTED AND WE ARE NOW SHIFTING INTO ANOTHER PHASE OF 11 THIS TRIAL. WE ARE SHIFTING INTO WHAT IS KNOWN AS 12 REBUTTAL SO MR. SUPLEE. 13 MR. SUPLEE: YES, YOUR HONOR, IF I MAY, 14 JUST TO GIVE EVERYBODY SOME HOPE, WE WILL HAVE MR. 15 AUSTIN AND DR. ZAHN AND A SHORT DEPOSITION EXCERPT AND 16 THAT WILL BE IT. 17 THE COURT: OKAY. 18 MR. SUPLEE: CHECKPOINT CALLS NEIL 19 AUSTIN. 20 (NEIL AUSTIN PREVIOUSLY SWORN.) 21 DIRECT EXAMINATION 22 BY MR. SUPLEE: 23 Q. SO SINCE YOU WERE PREVIOUSLY SWORN, MR. AUSTIN, 24 YOU UNDERSTAND THAT YOU ARE STILL UNDER OATH HERE TODAY. 25 A. YES, I DO.</p>	<p>1 INVESTIGATION BEING CONDUCTED BY MYSELF, WE DETERMINED 2 THAT MR. GEIGES HAD BEEN CONSPIRING, IF YOU WILL, WITH 3 THE GENERAL MANAGER OF OUR JAPANESE OPERATIONS IN ORDER 4 TO POSSIBLY FORM A NEW AND COMPETING COMPANY IN JAPAN. 5 Q. DID YOU UNDERTAKE THIS INVESTIGATION AT 6 SOMEONE'S DIRECTION? 7 A. YES. 8 Q. AND AT WHOSE DIRECTION? 9 A. THE PRESIDENT, CHIEF EXECUTIVE OFFICER. 10 Q. AND AFTER YOU DISCOVERED THIS INFORMATION ABOUT 11 MR. GEIGES, WHAT HAPPENED THEN? 12 A. IN ACCORDANCE WITH MR. GEIGES'S EMPLOYMENT 13 AGREEMENT, IF HE HAD BEEN TERMINATED, HE WAS ENTITLED TO 14 A NUMBER OF MONTHS SEVERANCE PAY. DURING THE COURSE OF 15 THE -- OF SHORTLY AFTER HE WAS TERMINATED, WHEN WE 16 DETERMINED THAT HE WAS ACTING IN CONFLICT WITH HIS 17 AGREEMENT, WE -- THE COMPANY MADE A DECISION NOT TO PAY 18 HIS SEVERANCE PAY. 19 Q. AND THEN WHAT HAPPENED? LET ME BACK UP A 20 SECOND. 21 WHEN YOU SAY YOU DID THAT, WAS SOME 22 DETERMINATION MADE AS TO WHETHER OR NOT HE HAD BEEN 23 TERMINATED FOR CAUSE? 24 A. WELL, HIS EMPLOYMENT CONTRACT HAD PROVISIONS IN 25 IT THAT DEALT WITH WHAT WOULD HAPPEN IF YOU WERE</p>

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1 with me.  
 2 As a result of our visit to All-Tag I sat  
 3 down with Gary Mazoki and described to him what I had  
 4 seen.  
 5 In conjunction with that, I also gave that  
 6 same information to Mr. Mazoki, had written a  
 7 memorandum summarizing that information. A copy of  
 8 that also went to Mr. Wacker. Mr. Wacker in this  
 9 memorandum is now making some additional comments to  
 10 Mr. Mazoki, in addition to what I had been saying to  
 11 Mr. Mazoki.  
 12 Q. Directing your attention to the, I guess the fifth  
 13 paragraph beginning with the words: Boels mentioned.  
 14 A. Yes.  
 15 MR. SUPLEE: If we can highlight that.  
 16 BY MR. SUPLEE:  
 17 Q. Boels mentioned they intend to officially enter  
 18 the U.S. market in September.  
 19 Does that comport with your recollection of  
 20 what was said?  
 21 A. Yes, it does.  
 22 Q. There has been testimony, Mr. Austin, that you  
 23 said that Checkpoint would lead All-Tag with legal  
 24 fees.  
 25 Did you say during that meeting or anything

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1 like that?  
 2 A. No.  
 3 Q. There has been testimony that you said that you  
 4 would put All-Tag Belgium into bankruptcy.  
 5 Did you say that or anything like that?  
 6 A. No.  
 7 Q. There has been testimony that you acted in a  
 8 brutal way toward the All-Tag representatives, did you  
 9 play the ugly American?  
 10 A. No, not in the least. I thought we had a rather  
 11 pleasant meeting given the circumstances of the  
 12 parties being competitors and opposing each other.  
 13 In fact what I considered to be a very  
 14 pleasant lunch, where even personal areas were  
 15 discussed.  
 16 Q. Briefly, let's move to the second lawsuit, the  
 17 second Swiss lawsuit filed on April 21, 1998.  
 18 Can you tell us what patent was involved  
 19 there?  
 20 A. Two patents, one was the Lichtblau deactivation  
 21 patent. The other was the Swiss equivalent of the  
 22 European patent, Jorgensen hole in the dielectric,  
 23 which I think is the way that one can say it is a  
 24 counterpart of the '555 patent, which is registered in  
 25 the United States.

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1 Q. We heard testimony from one of the patent  
 2 witnesses sometime within the last couple of weeks  
 3 about how one goes about obtaining a European patent,  
 4 are you generally aware that you can obtain a European  
 5 patent?  
 6 A. Yes, well while not being a patent attorney  
 7 generally one files --  
 8 MR. TILLERY: Can I object to this. This  
 9 constitutes expert testimony on patent law. The  
 10 gentleman just established he is not a patent lawyer  
 11 and he shouldn't be able to testify about how to apply  
 12 for patents and we already has testimony from two  
 13 experts.  
 14 THE COURT: I'll sustain the objection.  
 15 BY MR. SUPLEE:  
 16 Q. Can you tell us what you as general counsel of  
 17 Checkpoint know about European patents and how to  
 18 obtain them?  
 19 MR. TILLERY: The same objection, your Honor  
 20 He is trying to weasel it in a different way.  
 21 THE COURT: Again, I'm not quite sure what  
 22 you are seeking.  
 23 MR. SUPLEE: I can say it, your Honor.  
 24 THE COURT: Why don't you just ask the  
 25 question.

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1 MR. SUPLEE: Okay.  
 2 BY MR. SUPLEE:  
 3 Q. You referred in your answer to a European patent  
 4 and you referred to the Swiss counterpart to the '555  
 5 patent, did I hear you right?  
 6 A. That's correct.  
 7 Q. Can you tell us, if you know, what the connection  
 8 is between the European patent and the Swiss  
 9 counterpart?  
 10 MR. TILLERY: Objection, your Honor. He is  
 11 talking about European and Swiss patent law.  
 12 THE COURT: Overruled. He made reference to  
 13 both.  
 14 Overruled.  
 15 Q. In applying for a patent, there are two ways in  
 16 which an inventor can apply for a patent. One is  
 17 apply to the European Patent Office, where there is an  
 18 examination by the European patent office.  
 19 MS. QUINN: Your Honor, I'm sorry to  
 20 interrupt. I thought we would get his personal  
 21 knowledge of what he knew about the relationship. We  
 22 are now getting the same testimony about European  
 23 patent law, something that in fact the parties had  
 24 agreed, U.S. patent law --  
 25 THE COURT: The question is what is the

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24  
25

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1 INDEX

2

3 DEFENSE WITNESSES

4 Gary Mazoki

5 (via deposition excerpts) p. 16

6

7 PLAINTIFF'S REBUTTAL WITNESSES D C RD RC

8 Neil Austin 98 140 226

9

10

11

12

13 CERTIFICATE

14 We certify that the foregoing transcript is a  
15 true and accurate record of the proceedings in the  
16 above-captioned matter.

17 \_\_\_\_\_

18 Date Nancy O'Neill

19 \_\_\_\_\_

20 Date Suzanne White

21 \_\_\_\_\_

22 Date Sidney Rothschild

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHECKPOINT SYSTEMS, INC.,  
Plaintiff

vs. Civil Action  
01-2223

ALL-TAG SECURITY S.A.,  
ALL-TAG SECURITY AMERICAS, INC.,  
and SENSORMATIC ELECTRONICS CORP.,  
Defendants

Day 11 of Trial  
February 12, 2007  
Courtroom 9-B  
Philadelphia, PA

Before THE HONORABLE PETRESE B. TUCKER, J.  
and a Jury

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PROCEEDINGS

THE COURT: Good morning.

Are there any matters we need to cover before  
the jurors are brought out?

MR. BREINER: No, your Honor.

MR. SUPLEE: Your Honor, I will just mention  
that we had submitted three supplemental points for  
charge which I assume the court has. And the assignor  
estoppel issue is still hanging there, but I don't think  
the court need deal with it at this point before the  
jurors is brought out.

THE COURT: Yes. Okay.

MR. TILLERY: For the record, we received  
those recently and we would oppose that for a variety of  
reasons, and we will explain when appropriate.

MR. BREINER: All-Tag joins him.

THE COURT: We can bring out our jurors.

(At 9:45, the jury entered the courtroom.)

THE COURT: Good morning. You may be seated.  
I think they did turn up the air in here  
today. So if you get cold, let me know. But it is  
noticeably cooler in here today.

MR. HAZLETT: Your Honor, as the next part of  
Checkpoint's rebuttal case, we would like to read in a  
portion of the Rule 30 (b)(6) deposition of Sensormatic

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Electronics Corp. by HUBERT A. PATTERSON. The  
deposition was held on July 14, 2006. I attended on  
behalf of Checkpoint and Mr. Tillery represented  
Sensormatic.  
THE COURT: Okay.  
BY MR. HAZLETT:  
Q Beginning on page 61 of the transcript.  
Mr. Patterson, let me hand you what has  
previously been marked as plaintiff's exhibit 100. It's  
a two-page outline Bates stamped SEN 000591 through 92.  
Have you seen this document before today?

MR. TILLERY: Excuse me. My copy says P-17.

MR. HAZLETT: Your Honor, it does. But as  
everyone has been doing throughout this trial, I will be  
substituting the trial exhibit number for the deposition  
exhibit number.

MR. TILLERY: Okay. Excuse me.

MR. HAZLETT: No problem.

BY MR. HAZLETT:

Q Let me read that again.

Mr. Patterson, let me hand you what has  
previously been marked as plaintiff's exhibit 100. It's  
a two-page outline Bates stamped SEN 00591 through 92.  
Have you seen this document before today?  
A Yes, I have.

<p style="text-align: right;">Page 29</p> <p>1 are talking about claim 1 now -- did you hear Dr. Rose</p> <p>2 say that his reading of claim 1 required that the</p> <p>3 short-circuit needs to appear through the space or along</p> <p>4 the wall of the space?</p> <p>5 A I heard him say that.</p> <p>6 MR. BREINER: Objection, your Honor.</p> <p>7 THE COURT: Well, he has answered. I'm going</p> <p>8 to overrule to this question.</p> <p>9 He said yes.</p> <p>10 BY MR. McKINLEY:</p> <p>11 Q Now, Dr. Zahn testified about what his</p> <p>12 understanding of that claim was.</p> <p>13 THE COURT: Dr. Rose.</p> <p>14 MR. McKINLEY: Thank you.</p> <p>15 BY MR. McKINLEY:</p> <p>16 Q Dr. Rose testified about what his understanding of</p> <p>17 that portion of the claim was. And I want to ask you</p> <p>18 not about your reading of the claim, Dr. Zahn, but about</p> <p>19 what one of skill in the art would have understood the</p> <p>20 last part of that claim to mean.</p> <p>21 MR. BREINER: Your Honor, same objection. He</p> <p>22 testified on his direct as to what the claim meant, and</p> <p>23 now he is asking him to testify again what the claim</p> <p>24 meant.</p> <p>25 THE COURT: Well, overruled. Overruled.</p>	<p style="text-align: right;">Page 31</p> <p>1 will not necessarily travel all the way entirely in the</p> <p>2 throughhole, but perhaps partly within the dielectric</p> <p>3 material.</p> <p>4 Q Did you hear Dr. Rose talk about differences</p> <p>5 between the process that is shown in the '343 patent and</p> <p>6 the All-Tag process that has been in place since 2001?</p> <p>7 A You said differences?</p> <p>8 Q Yeah. Did you hear Dr. Rose talk about differences</p> <p>9 between the process that is shown in the '343 patent --</p> <p>10 and let me put a sharper edge on it.</p> <p>11 A Okay. Now I understand your question. But let me</p> <p>12 let you start again.</p> <p>13 Q Do you recall Dr. Rose's testimony that were</p> <p>14 identifying certain things that were present in the</p> <p>15 All-Tag process as it's used in Belgium distinct from</p> <p>16 what is shown in the '343 patent, do you remember him</p> <p>17 saying that?</p> <p>18 A I do.</p> <p>19 Q Do those differences change your opinion?</p> <p>20 A No, not at all.</p> <p>21 MR. BREINER: Objection, your Honor.</p> <p>22 THE COURT: Overruled.</p> <p>23 BY MR. McKINLEY:</p> <p>24 Q And why not?</p> <p>25 A Well, the differences were, for example, the exact</p>
<p style="text-align: right;">Page 30</p> <p>1 You may answer.</p> <p>2 THE WITNESS: The way I would look -- it's a</p> <p>3 very simple phenomenon that we are trying to describe</p> <p>4 here.</p> <p>5 If you make -- manufacture a tag without a</p> <p>6 throughhole, and you find that it has an extremely high</p> <p>7 voltage for deactivation, and then if you take that same</p> <p>8 tag and the only change you make is to put a throughhole</p> <p>9 within the dielectric layer and it deactivates at very,</p> <p>10 very low voltages, then that throughhole has served as</p> <p>11 the means for short circuit deactivation of the tag.</p> <p>12 And that's the language of the fourth element of claim</p> <p>13 1.</p> <p>14 BY MR. McKINLEY:</p> <p>15 Q So with regard to Dr. Rose's testimony about what</p> <p>16 he thought a path was, do you recall hearing him testify</p> <p>17 about that?</p> <p>18 A Yes.</p> <p>19 Q What do you believe one of ordinary skill in the</p> <p>20 art would read that claim to mean with regard to a short</p> <p>21 circuit path?</p> <p>22 A Well, that the throughhole provides the means for</p> <p>23 the short-circuit deactivation of the tag. More than 90</p> <p>24 percent of the time the spark discharge will travel</p> <p>25 entirely through the throughhole, but on occasion it</p>	<p style="text-align: right;">Page 32</p> <p>1 temperature of the heating rod to compress the</p> <p>2 electrodes together, the amount of time they had been</p> <p>3 applied, what the pressure was, none of that is</p> <p>4 necessary.</p> <p>5 The fourth element of claim 1 and claim 15</p> <p>6 doesn't care how the throughhole was made, what the</p> <p>7 temperature was, what the pressure was, how long it</p> <p>8 took. All that's needed is a throughhole that provides</p> <p>9 a means for short-circuit deactivation. Doesn't matter</p> <p>10 temperature, exact process. But if the result is a</p> <p>11 throughhole, then it practices that</p> <p>12 element.</p> <p>13 Q Did you hear Dr. Rose's testimony about what is</p> <p>14 required under the scientific method?</p> <p>15 A Yes.</p> <p>16 Q When you use the scientific method, there is a</p> <p>17 starting point, right?</p> <p>18 A Yes. Because you can't reinvent all of science and</p> <p>19 start from the beginning. There are certain learned</p> <p>20 truths that have been verified by many investigators.</p> <p>21 They are publishing authoritative journals and</p> <p>22 textbooks. You have to start at a certain level and</p> <p>23 then advance knowledge from that level.</p> <p>24 Q Did you take certain facts as true in this case?</p> <p>25 A Yes.</p>

<p style="text-align: right;">Page 33</p> <p>1 Q And what facts did you take as true?</p> <p>2 A The patents '343 and '466 patents.</p> <p>3 Q And why did you take those as true?</p> <p>4 A Well, those are documents that have been submitted</p> <p>5 to the court. They must be -- and to the patent office.</p> <p>6 They must be truthful and they -- The records show that</p> <p>7 those patents describe the manufacutring processes</p> <p>8 practiced by All-Tag.</p> <p>9 Q And who told that you?</p> <p>10 A Well, Dr. Rose's rebuttal report of June 16th, 2006</p> <p>11 was the most explicit that says that All-Tag prior to</p> <p>12 2001 practiced the '466 patent, after 2001 practiced the</p> <p>13 '343 patent.</p> <p>14 But there was also deposition testimony by Mr.</p> <p>15 Boels that explicitly stated now we practice the '343</p> <p>16 patent. That is what All-Tag practices.</p> <p>17 And then also there was -- I think it's March</p> <p>18 31st of 2006, All-Tag and Sensormatic's responses to</p> <p>19 Checkpoint's requests for admissions.</p> <p>20 Q And all those things that you mentioned, you had</p> <p>21 the All-Tag and Sensormatic responses to requests for</p> <p>22 admissions, you had Dr. Rose's rebuttal report and you</p> <p>23 had Mr. Boels' testimony. If you didn't have those</p> <p>24 three things, what would you have done differently?</p> <p>25 MR. BREINER: Objection, your Honor. He</p>	<p style="text-align: right;">Page 35</p> <p>1 perfectly proper to rebut Dr. Rose's testimony that what</p> <p>2 he did was not enough.</p> <p>3 THE COURT: Well, he has already said what he</p> <p>4 relied on.</p> <p>5 MR. McKINLEY: But I'm trying to say why did</p> <p>6 he not -- in other words, why did he not study the</p> <p>7 product, too? They put that in through Dr. Rose, that</p> <p>8 he should have studied product 2. And I want to say why</p> <p>9 did he not do that. I should be able to do that.</p> <p>10 THE COURT: Well, on direct he testified that</p> <p>11 he didn't -- it was brought out that he didn't study</p> <p>12 product 2.</p> <p>13 MR. TILLERY: He didn't even see it, or study</p> <p>14 it.</p> <p>15 THE COURT: And he said he didn't need it to</p> <p>16 reach his conclusion.</p> <p>17 MR. McKINLEY: Right. But it wasn't brought</p> <p>18 out why he didn't need it. And I didn't need to bring</p> <p>19 it out until the defendants brought up that it wasn't</p> <p>20 enough.</p> <p>21 THE COURT: And you say why he didn't need it.</p> <p>22 MR. McKINLEY: Because he had other</p> <p>23 information that pointed him -- that told him what the</p> <p>24 product was.</p> <p>25 MR. BREINER: He said that.</p>
<p style="text-align: right;">Page 34</p> <p>1 testified on his direct --</p> <p>2 THE COURT: Sustained.</p> <p>3 BY MR. McKINLEY:</p> <p>4 Q Dr. Zahn, did you hear Dr. Rose's testimony that he</p> <p>5 does not believe that what you did in conducting your</p> <p>6 work rose to the proper level to establish with</p> <p>7 reasonable scientific certainty that the tags infringed,</p> <p>8 did you hear him say that?</p> <p>9 A Yes, I did.</p> <p>10 Q Now, what would you have done differently if you</p> <p>11 did not have the information that you had regarding the</p> <p>12 second process that defendants talked about?</p> <p>13 MR. BREINER: Objection, your Honor. Same</p> <p>14 objection as before.</p> <p>15 MR. McKINLEY: Your Honor, the defendants have</p> <p>16 challenged Dr. --</p> <p>17 THE COURT: Let's go to sidebar.</p> <p>18 (Sidebar as follows:)</p> <p>19 MR. McKINLEY: Your Honor, the defendants have</p> <p>20 challenged Dr. Rose's work and that what he did was not</p> <p>21 enough to rise to a level of reasonable degree of</p> <p>22 scientific certainty. They have essentially said that</p> <p>23 he should have done things differently. He should have</p> <p>24 done things differently. And all I'm trying to do is to</p> <p>25 establish through Dr. Zahn what did he rely on. That is</p>	<p style="text-align: right;">Page 36</p> <p>1 THE COURT: He did say that.</p> <p>2 MR. BREINER: He said he had all 10 things and</p> <p>3 he said he could just rely on any one of them --</p> <p>4 THE COURT: Because the question was asked on</p> <p>5 redirect why, you know, why did you do it, did you need</p> <p>6 this, why didn't you need it? These particular sets of</p> <p>7 questions were asked to him on redirect after cross</p> <p>8 examination in the case in chief.</p> <p>9 MR. McKINLEY: I'm just trying to establish,</p> <p>10 your Honor, that if he didn't have these things what</p> <p>11 would he have done in that case. I think the jury</p> <p>12 should know he didn't just blatantly decide not to look</p> <p>13 at product 2. He had information and that is why he</p> <p>14 didn't need to do that. And that is rebutting what Dr.</p> <p>15 Rose said.</p> <p>16 THE COURT: You are asking him why -- what is</p> <p>17 he going to say?</p> <p>18 MR. McKINLEY: I'm asking him what would you</p> <p>19 have done if you didn't have any information -- if the</p> <p>20 defendants didn't tell you anything essentially about</p> <p>21 their second process, what would you have done?</p> <p>22 He is going to say I would have studied the</p> <p>23 product, but I didn't need to because I had all of this</p> <p>24 information. That is what he is going to say. Just</p> <p>25 like he did the first time.</p>

<p style="text-align: right;">Page 38</p> <p>1 BY MR. McKINLEY:</p> <p>2 Q. Dr. Zahn, just to circle back for a moment. You</p> <p>3 said you were in the courtroom when Dr. Rose</p> <p>4 testified, that it wasn't enough for you to rely on a</p> <p>5 '343 patent to reach a conclusion that the All-Tag</p> <p>6 product made in accordance with that patent contains a</p> <p>7 throughhole and that the throughhole provides a</p> <p>8 short-circuit path, right?</p> <p>9 A. I heard that.</p> <p>10 Q. How did you learn that All-Tag was manufacturing</p> <p>11 labels after 2001 according to the process described</p> <p>12 in the '343 patent?</p> <p>13 A. From Dr. Rose's rebuttal report of June 16, 2006.</p> <p>14 Q. Anything else?</p> <p>15 A. Mr. Boels' testimony. And from All-Tag and</p> <p>16 Sensormatic's responses to the request for admissions</p> <p>17 by Checkpoint attorneys.</p> <p>18 Q. How many times did All-Tag tell you that it makes</p> <p>19 resonant labels according to the process in the '343</p> <p>20 patent after 2001?</p> <p>21 MR. BREINER: Objection.</p> <p>22 A. 335 times.</p> <p>23 Q. 335 times?</p> <p>24 A. That is correct.</p> <p>25 Q. How many times did Sensormatic tell you that</p>	<p style="text-align: right;">Page 40</p> <p>1 Q. What do you mean by the same thing?</p> <p>2 A. Just read the title, Sensormatic's responses to</p> <p>3 Checkpoint's request for admissions.</p> <p>4 Q. That's marked as plaintiff's Exhibit 19 through</p> <p>5 23, right?</p> <p>6 A. Yes.</p> <p>7 Q. If you can look at the first request for admission</p> <p>8 and the answer.</p> <p>9 What does it say?</p> <p>10 What was Checkpoint asking All-Tag to admit</p> <p>11 in that first request for admission?</p> <p>12 A. All-Tag was supposed to say if they agree or</p> <p>13 disagree with the statement All-Tag's resonance labels</p> <p>14 are deactivatable.</p> <p>15 Q. What was their response?</p> <p>16 A. Well, rather than just a simple yes, which would</p> <p>17 be the correct response --</p> <p>18 MR. BREINER: Your Honor. I object he is</p> <p>19 testifying.</p> <p>20 THE COURT: Sustained.</p> <p>21 BY MR. McKINLEY:</p> <p>22 Q. Do they point to the two patents in that response?</p> <p>23 A. Yes.</p> <p>24 MR. TILLERY: If we talk about the response,</p> <p>25 let's read the entire response, that's what is</p>
<p style="text-align: right;">Page 39</p> <p>1 All-Tag makes its resonant labels according to the</p> <p>2 process in the '343 patent after 2001?</p> <p>3 A. Also 335 times.</p> <p>4 MR. McKINLEY: May I approach the witness?</p> <p>5 THE COURT: Yes.</p> <p>6 Q. Dr. Zahn, I hand you two binders, correct?</p> <p>7 A. Yes.</p> <p>8 Q. If you can look at the first binder which is</p> <p>9 marked plaintiff's exhibits 25 through 29?</p> <p>10 A. Yes.</p> <p>11 Q. What are they?</p> <p>12 A. The title is defendant All-Tag's S.A. and All-Tag</p> <p>13 Security Americas Incorporated responses to</p> <p>14 plaintiff's first set for admissions.</p> <p>15 Q. And, is that one of the documents that -- is that</p> <p>16 one of the documents that starts to -- let me state</p> <p>17 it again.</p> <p>18 You mentioned that All-Tag had mentioned 335</p> <p>19 times that they made the product under the '343 patent</p> <p>20 after 2001, right?</p> <p>21 A. Yes.</p> <p>22 Q. Does that binder the proof?</p> <p>23 A. Yes.</p> <p>24 Q. And what is the second binder of documents?</p> <p>25 A. The same thing but for Sensormatic.</p>	<p style="text-align: right;">Page 41</p> <p>1 appropriate in requests for admissions.</p> <p>2 MR. McKINLEY: I agree, your Honor.</p> <p>3 MR. BREINER: I have a more basic objection.</p> <p>4 This response was up on the board in their direct</p> <p>5 case. Nobody disputes that it the response was made.</p> <p>6 All-Tag will stipulate to its response, it</p> <p>7 was identical for all 385 of the requests that we</p> <p>8 objected to them on a number of grounds and that we</p> <p>9 answered with the one same response.</p> <p>10 MR. TILLERY: Your Honor, we are going</p> <p>11 through what was gone through in the case in chief.</p> <p>12 THE COURT: I'll permit you to read this one</p> <p>13 but hopefully we will not do it for all of them.</p> <p>14 MR. McKINLEY: We are not. We will do the</p> <p>15 one.</p> <p>16 THE COURT: Go ahead.</p> <p>17 A. Okay. At the very beginning there is some</p> <p>18 objection. So let me read it for completeness. It</p> <p>19 says objection. See general objections incorporated</p> <p>20 herein by reference.</p> <p>21 All-Tag further objects to the request on the</p> <p>22 grounds that it is vague, indefinite and/or ambiguous</p> <p>23 without waiving the objections and subject thereto,</p> <p>24 All-Tag admits that the All-Tag Security S.A.</p> <p>25 deactivatable resonance tags are made generally in</p>

<p style="text-align: right;">Page 42</p> <p>1 accordance with U.S. patent 5,187,466 and as found by</p> <p>2 the International Trade Commission investigation</p> <p>3 number 337-TA-347 or on the United States patent</p> <p>4 application serial number 10/472,088, filed March 19,</p> <p>5 2001.</p> <p>6 All-Tag has previously produced the '466</p> <p>7 patent and the '088 patent application to Checkpoint.</p> <p>8 All-Tag has also previously produced the ITC</p> <p>9 decision to Checkpoint and to which case Checkpoint</p> <p>10 was a party.</p> <p>11 To the extent further responses required,</p> <p>12 denied.</p> <p>13 Q. Without getting into the rest, the 334 mentioned</p> <p>14 in the first set of admissions, can you generally</p> <p>15 characterize what the requests were? What types of</p> <p>16 questions were asked of All-Tag?</p> <p>17 A. Simple declarative --</p> <p>18 MR. BREINER: Objection, your Honor.</p> <p>19 THE COURT: Sustained.</p> <p>20 BY MR. McKINLEY:</p> <p>21 Q. Were the statements about the structure of the</p> <p>22 tag?</p> <p>23 MR. BREINER: Objection, your Honor.</p> <p>24 THE COURT: Sustained.</p> <p>25 BY MR. McKINLEY:</p>	<p style="text-align: right;">Page 44</p> <p>1 A. I had my first report in June of 2006. And a</p> <p>2 rebuttal report I believe it is dated June 16, 2006.</p> <p>3 Q. You refer to Dr. Rose's June 16, 2006 rebuttal</p> <p>4 report. I believe you said that in that report he</p> <p>5 strongly - - well, why don't you tell us what did you</p> <p>6 learn from his report on June 16th?</p> <p>7 MR. BREINER: Objection, your Honor, it is</p> <p>8 cumulative, asked and answered.</p> <p>9 THE COURT: Sustained.</p> <p>10 MR. McKINLEY: Can I have plaintiff's</p> <p>11 Exhibit 58? I'm sorry, defendant's Exhibit 58.</p> <p>12 If we can turn to page nine.</p> <p>13 MR. BREINER: Objection, your Honor.</p> <p>14 MR. McKINLEY: Dr. Zahn earlier testified</p> <p>15 about something he read in Dr. Rose's report. I want</p> <p>16 to see if this is what he is referring to.</p> <p>17 MR. BREINER: This is the third time he asked</p> <p>18 the question.</p> <p>19 MR. McKINLEY: I didn't relate the document</p> <p>20 to Dr. Zahn's testimony.</p> <p>21 MR. TILLERY: Can we take the document down,</p> <p>22 please.</p> <p>23 THE COURT: Sustained.</p> <p>24 BY MR. McKINLEY:</p> <p>25 Q. I'll ask you one question, I think maybe will sum</p>
<p style="text-align: right;">Page 43</p> <p>1 Q. Let's back up a moment, Dr. Zahn.</p> <p>2 When did you receive the labels that we</p> <p>3 discussed last week which you conducted tests on?</p> <p>4 A. In February of 2004.</p> <p>5 Q. Did you do your testing shortly after receiving</p> <p>6 them?</p> <p>7 A. Yes, I did.</p> <p>8 Q. When did you receive the combined 670 statements</p> <p>9 that the All-Tag resonance lables were made generally</p> <p>10 in accordance with the '466 patent and the ITC</p> <p>11 determination?</p> <p>12 MR. BREINER: Objection.</p> <p>13 Q. Or the '343 patent?</p> <p>14 THE COURT: Overruled. You may answer.</p> <p>15 A. I received them around April of 2006.</p> <p>16 Q. What did you do when you received them?</p> <p>17 A. I read this very, very carefully for more</p> <p>18 information about the All-Tag labels.</p> <p>19 Q. Did you make any decisions about what to do?</p> <p>20 MR. BREINER: Objection, your Honor. It is</p> <p>21 the same objection we had at sidebar.</p> <p>22 THE COURT: Sustained.</p> <p>23 BY MR. McKINLEY:</p> <p>24 Q. When did you issue your report concluding that the</p> <p>25 All-Tag products infringed the '555 patent?</p>	<p style="text-align: right;">Page 45</p> <p>1 all of this up?</p> <p>2 Why did you decide to do physical testing as</p> <p>3 we look at your exhibit of things that you did.</p> <p>4 MR. McKINLEY: If may approach, your Honor to</p> <p>5 see the number?</p> <p>6 THE COURT: Yes.</p> <p>7 Q. On plaintiff's Exhibit 314, why did you decide to</p> <p>8 study labels back in 2004, but not study labels or do</p> <p>9 physical testing on the later products?</p> <p>10 MR. BREINER: Objection, your Honor. The</p> <p>11 same objection we had at sidebar.</p> <p>12 THE COURT: Sustained.</p> <p>13 BY MR. McKINLEY:</p> <p>14 Q. The defendants, and Dr. Rose suggested that you</p> <p>15 cannot reach a conclusion to a reasonable degree of</p> <p>16 scientific certainty that a product meets the elements</p> <p>17 of the claim in the patent unless you physically</p> <p>18 examine what they call product 2 itself.</p> <p>19 Do you agree with that statement?</p> <p>20 A. No.</p> <p>21 Q. Why?</p> <p>22 A. Because the record stated that product 2 of</p> <p>23 All-Tag was made exactly the way that it's described</p> <p>24 in the '343 patent.</p> <p>25 I went to the '343 patent. I saw that it had</p>

<p style="text-align: right;">Page 46</p> <p>1 a throughhole used for short-circuit deactivation of</p> <p>2 an RF resonant label; to my mind that was case closed.</p> <p>3 It had practiced the two important sub elements of the</p> <p>4 element four of claim one and claim 15. It had a</p> <p>5 throughhole and which provided a means for</p> <p>6 short-circuit deactivation of an RF resonant label.</p> <p>7 MR. McKINLEY: No more questions.</p> <p>8 THE COURT: Mr. Breiner.</p> <p>9 MR. BREINER: Just a second, your Honor, to</p> <p>10 put the notes together.</p> <p>11 MR. McKINLEY: Before Mr. Breiner begins, may</p> <p>12 I move the plaintiff's exhibits in, 19 through 23 and</p> <p>13 25 through 29?</p> <p>14 THE COURT: Yes.</p> <p>15 CROSS-EXAMINATION</p> <p>16 BY MR. BREINER:</p> <p>17 Q. Dr. Zahn, you were testifying about these requests</p> <p>18 for admissions and the answers by All-Tag. Do you</p> <p>19 recall that?</p> <p>20 A. Yes.</p> <p>21 Q. Are you aware that the requests for admissions</p> <p>22 went to a number of different All-Tag labels?</p> <p>23 A. I believe five different labels.</p> <p>24 Q. Are you aware that some of those labels</p> <p>25 encompassed non-deactivatable tags?</p>	<p style="text-align: right;">Page 48</p> <p>1 you used the word exactly.</p> <p>2 Did you use the word exactly?</p> <p>3 A. When I spoke?</p> <p>4 Q. Yes.</p> <p>5 A. I think the transcript would probably say if I did</p> <p>6 or didn't.</p> <p>7 I probably did because Dr. Rose's report says</p> <p>8 the process for the post 2001 tags are made by the</p> <p>9 '343 patent.</p> <p>10 Mr. Boels' deposition - - you asked me a</p> <p>11 question.</p> <p>12 THE COURT: Let him finish.</p> <p>13 THE WITNESS: Mr. Boels' deposition testimony</p> <p>14 also says we make the tags according to the '343</p> <p>15 patent.</p> <p>16 BY MR. BREINER:</p> <p>17 Q. Do they say exactly?</p> <p>18 A. The word exactly? I would like to have Mr. Boels'</p> <p>19 transcript and look up with an index, look up the word</p> <p>20 exactly but he says - -</p> <p>21 THE COURT: The question is not what they</p> <p>22 said. The question is what you said?</p> <p>23 THE WITNESS: No. We have gone beyond that.</p> <p>24 As I understand the question was, is where it</p> <p>25 might have said that All-Tag practiced its new tags</p>
<p style="text-align: right;">Page 47</p> <p>1 A. I'm aware of that.</p> <p>2 Q. So in response to the first one, All-Tag's</p> <p>3 resonant labels are deactivatable, wouldn't you agree</p> <p>4 with me you couldn't answer that yes, they are, when</p> <p>5 it is going to a non-deactivatable tag?</p> <p>6 MR. McKINLEY: Objection.</p> <p>7 THE COURT: Overruled. The Doctor I'm sure</p> <p>8 can answer.</p> <p>9 A. I mean the correct answer, All-Tag makes some</p> <p>10 deactivatable tags and some non-deactivatable tags.</p> <p>11 Q. You can't admit or deny that, can you?</p> <p>12 I'll put up the first request for admission.</p> <p>13 I wrote down your testimony.</p> <p>14 You testified a second ago that All-Tag</p> <p>15 admitted that they make their product, process 2 and</p> <p>16 product 2 exactly, you used the word exactly as</p> <p>17 disclosed in these patents.</p> <p>18 Is there any anyplace in there that says</p> <p>19 exactly?</p> <p>20 A. I didn't say that. I said they are made generally</p> <p>21 in accordance. I read it exactly the way it is</p> <p>22 written there. Generally in accordance.</p> <p>23 Q. I understand that. The answer you just told this</p> <p>24 jury that you relied on a '343 patent because it was</p> <p>25 All-Tag admitted that they made their product exactly,</p>	<p style="text-align: right;">Page 49</p> <p>1 exactly the way that the '343 patent described.</p> <p>2 BY MR. BREINER:</p> <p>3 Q. That was your testimony this morning five minutes</p> <p>4 ago, wasn't it?</p> <p>5 A. Yes.</p> <p>6 Q. This statement here says that All-Tag admits that</p> <p>7 All-Tag Security S.A. deactivatable resonance tags are</p> <p>8 made generally. It doesn't say exactly, it says</p> <p>9 generally, doesn't it?</p> <p>10 A. I read it exactly that way. Generally in</p> <p>11 accordance. That's this document but the other</p> <p>12 testimony didn't use the word generally.</p> <p>13 Q. Were you are here in Court last week when Dr. Rose</p> <p>14 testified in his expert rebuttal report that he meant</p> <p>15 that they used the processes generally?</p> <p>16 A. That's not what his report says.</p> <p>17 Q. I am asking you, were you here when he testified</p> <p>18 that way?</p> <p>19 A. I was here.</p> <p>20 Q. That's all I asked you.</p> <p>21 Let's talk a little bit about the issue of</p> <p>22 obviousness.</p> <p>23 Now, the '555 patent refers to the Lichtblau</p> <p>24 '473 patent as prior art?</p> <p>25 A. I have to double check. I believe so.</p>

<p style="text-align: right;">Page 114</p> <p>1 MR. TILLERY: YOUR HONOR AS THE CLAIM</p> <p>2 THAT SENSORMATIC IS IN PRIVITY WITH THE ORIGINAL</p> <p>3 ASSIGNOR REMINDS ME A LITTLE BIT OF SIX DEGREES OF</p> <p>4 SEPARATION OUT OF A RUBE GOLDBERG STEP-BY-STEP OR SIX OR</p> <p>5 SEVEN WAYS DOWN THE LINE HERE.</p> <p>6 THE TWO THINGS YOUR HONOR MENTIONED.</p> <p>7 ONE, THE INDEMNITY, YES, THERE IS INDEMNITY, AND IT IS</p> <p>8 AN INDEMNITY THAT EVERY GOOD LAWYER SHOULD HAVE KNOWN</p> <p>9 ABOUT FROM MOMENT ONE IN THIS CASE. IT IS UNDER THE</p> <p>10 UNIFORM COMMERCIAL CODE. THE UNIFORM COMMERCIAL CODE</p> <p>11 SPECIFICALLY PROVIDES THAT IF I SELL SOMEONE A PRODUCT</p> <p>12 AND THAT ULTIMATE PRODUCT IS ALLEGED TO INFRINGE</p> <p>13 SOMEONE'S PATENT, THAT THERE IS AN INDEMNITY. THE</p> <p>14 SELLER HAS TO INDEMNIFY THE BUYER. THERE IS ACTUALLY AN</p> <p>15 INTERNATIONAL TREATY REGARDING THAT AS WELL.</p> <p>16 SO IF INDEMNITY WERE ENOUGH TO ESTABLISH</p> <p>17 ASSIGNOR ESTOPPEL, THEN IT WOULD ALWAYS BE THE CASE IN</p> <p>18 EVERY CASE WHERE YOU HAD A PURCHASER OF A PRODUCT SUCH</p> <p>19 AS SENSORMATIC. THAT IS WHY IT IS ONE OF THE REASONS</p> <p>20 WHY IT IS NOT. THE SECOND ITEM WAS WHETHER OR NOT</p> <p>21 SENSORMATIC WAS INVOLVED OR SOMEHOW THE PLAINTIFF'S</p> <p>22 MOTION ACTUALLY SAYS THAT WE JOINTLY DEVELOPED THE</p> <p>23 INFRINGING LABELS, WHICH IS SIMPLY NOT TRUE.</p> <p>24 ON PAGE 4 TO 5 OF OUR RESPONSE, YOUR</p> <p>25 HONOR, WE SET FORTH IN DETAIL THAT SENSORMATIC WAS NO</p>	<p style="text-align: right;">Page 116</p> <p>1 ENVELOPE THE OTHER PARTY FOR THIS TO BE PRIVITY, THAT</p> <p>2 CASE HAS BEEN CITED BY THE DEFENDANTS. THE CASE, THE</p> <p>3 LANGUAGE GENERALLY IN THE CASES IS MUCH MORE LIBERAL</p> <p>4 THAN THAT. THE KEY CASE IS THE SHAMROCK CASE WHICH</p> <p>5 FOCUSES UPON THE QUESTION OF WHETHER THE ONE IN --</p> <p>6 ASSERTED TO BE IN PRIVITY, THAT IS HERE ALL-TAG, WHETHER</p> <p>7 IT HAS BENEFITED FROM THE KNOWLEDGE OF THE INVENTOR</p> <p>8 ASSIGNOR AND BY THAT STANDARD, THERE IS NO QUESTION THAT</p> <p>9 ALL-TAG HAS BENEFITED FROM THE KNOWLEDGE OF THE INVENTOR</p> <p>10 ASSIGNOR JORGENSEN.</p> <p>11 SECONDLY, WITH RESPECT TO THE QUESTION OF</p> <p>12 WHETHER ALL-TAG IS USING EFFECTIVELY THE '555 PATENT,</p> <p>13 MR. BREINER IS RIGHT IN SAYING THAT AT THIS POINT THAT</p> <p>14 IS A DISPUTED ISSUE BUT WE WILL SOON HAVE AN ANSWER TO</p> <p>15 THAT. SO A POSSIBILITY IS THAT IF THAT ISSUE MATTERS TO</p> <p>16 THE COURT IN TERMS OF MAKING THIS DECISION, THE COURT</p> <p>17 CAN ALWAYS DEFER ITS RULING ON ASSIGNOR ESTOPPEL UNTIL</p> <p>18 IT HAS THE JURY'S RULING ON INFRINGEMENT AND, OF COURSE,</p> <p>19 IF THE JURY RULES AGAINST US ON THAT ISSUE THEN THERE IS</p> <p>20 NOTHING MORE TO TALK ABOUT, PERHAPS, BUT WE WILL WAIT</p> <p>21 AND SEE.</p> <p>22 THE COURT: AT LEAST NOT TO ME.</p> <p>23 MR. SUPLEE: AT LEAST NOT TO YOU.</p> <p>24 AND FOR ONE THING, ALL-TAG DOES IN FACT</p> <p>25 ADMIT THAT IT IS CURRENTLY USING THE '343 PATENT WHICH</p>
<p style="text-align: right;">Page 115</p> <p>1 MORE THAN A VERY DEMANDING CUSTOMER, AND WE WANTED TO</p> <p>2 INSURE THE PROPER QUALITY THAT THESE THINGS ACTUALLY</p> <p>3 WORKED AND THAT THEY WORKED ON A REGULAR BASIS. AND</p> <p>4 THAT IS WHAT OUR INVOLVEMENT WAS. OUR INVOLVEMENT WAS</p> <p>5 NOT AS A JOINT DEVELOPER, AND IT IS LUDICROUS TO SAY</p> <p>6 THAT.</p> <p>7 THERE IS ALSO A CLAIM THAT WE WERE THE</p> <p>8 EXCLUSIVE DISTRIBUTOR FOR SEVERAL YEARS. WELL, THE</p> <p>9 RECORD REFLECTS THAT THAT IS NOT TRUE EITHER. WE WERE</p> <p>10 THE EXCLUSIVE DISTRIBUTOR IN THE U.S. FOR LESS THAN ONE</p> <p>11 YEAR AND THAT RELATIONSHIP ENDED IN 1998. THE CITES ARE</p> <p>12 SET FORTH AT PAGE 5 OF OUR RESPONSE.</p> <p>13 SENSORMATIC IS LESS -- THIS RF TAG STUFF</p> <p>14 IS LESS THAN ONE PERCENT OF SENSORMATIC'S BUSINESS. WE</p> <p>15 FOCUS ON OUR ACOUSTO-MAGNETIC TECHNOLOGY. SUBSTANTIALLY</p> <p>16 DIFFERENT.</p> <p>17 UNDER ALL OF THOSE CIRCUMSTANCES, THE</p> <p>18 NOTION THAT WE ARE SOMEHOW IN PRIVITY WITH MR. JORGENSEN</p> <p>19 WHO IS WAY UP OR DOWN THE LINE IS SIMPLY WRONG, YOUR</p> <p>20 HONOR. THEREFORE ASSIGNOR ESTOPPEL CANNOT APPLY, AND</p> <p>21 INDEED IS REALLY IS LAW OF THE CASE AT THIS POINT AS</p> <p>22 WELL. THANK YOU.</p> <p>23 MR. SUPLEE: FIRST, VERY BRIEFLY, YOUR</p> <p>24 HONOR.</p> <p>25 THE NOTION THAT THE ASSIGNOR MUST</p>	<p style="text-align: right;">Page 117</p> <p>1 DOES HAVE ALL OF THE ESSENTIAL ELEMENTS OF THE '555</p> <p>2 PATENT AND THAT IS JORGENSEN'S PATENT.</p> <p>3 THE COURT: AS TO THE -- I GUESS I WILL</p> <p>4 START FROM THE BEGINNING -- THE DEFENSE RULE 50 MOTION,</p> <p>5 THE COURT WILL DENY THAT MOTION. I THINK THAT THE</p> <p>6 TESTIMONY -- OR THE EVIDENCE IS SUFFICIENT TO GO TO THE</p> <p>7 JURY ON THE ISSUE OF INFRINGEMENT.</p> <p>8 ON PLAINTIFF'S RULE 50 MOTION ON THE</p> <p>9 INVENTORSHIP, THE COURT WILL DENY THAT MOTION.</p> <p>10 LIKEWISE, I THINK THE TESTIMONY IS SUFFICIENT, THAT THE</p> <p>11 JURY COULD FIND BY CLEAR AND CONVINCING EVIDENCE AND</p> <p>12 CORROBORATION AS TO OWNERSHIP SO THAT ISSUE WILL GO TO</p> <p>13 THE JURY.</p> <p>14 ON THE ISSUE OF EQUITABLE ESTOPPEL AND</p> <p>15 THE OTHER EQUITABLE DEFENSES, THE COURT WILL SUBMIT</p> <p>16 THOSE TO THE JURY.</p> <p>17 ON THE ISSUE OF THE REVERSE DOCTRINE OF</p> <p>18 EQUIVALENCE, I THINK THAT THERE IS AN ISSUE AND THE</p> <p>19 COURT WILL GRANT THE RULE 50 MOTION ON THE REVERSE</p> <p>20 DOCTRINE OF EQUIVALENCE.</p> <p>21 ON THE ISSUE OF EQUITABLE ASSIGNOR</p> <p>22 ESTOPPEL, THE COURT WILL DENY THAT AS RELATES TO BOTH</p> <p>23 DEFENDANTS.</p> <p>24 I WILL JUST ADD FOR THE RECORD THAT IF</p> <p>25 THE COURT WERE TO GRANT IT AS TO ALL-TAG, THE EVIDENCE</p>

<p style="text-align: right;">Page 234</p> <p>1 YOU AND THE ISSUES THAT YOU HAVE BEEN ASKED TO DECIDE.</p> <p>2 AS YOU'RE BACK IN THAT ROOM, THINKING ALL THOSE THINGS</p> <p>3 OVER AND GETTING READY TO FILL OUT YOUR QUESTIONNAIRE, I</p> <p>4 WOULD LIKE YOU TO LEAVE WITH THAT ONE PARTING THOUGHT</p> <p>5 THAT I ASKED YOU AT THE VERY BEGINNING.</p> <p>6 NOW THAT YOU HAVE HEARD ALL THE EVIDENCE,</p> <p>7 WHAT DO YOU THINK? IS THIS A CASE ABOUT PROTECTING A</p> <p>8 USEFUL INVENTION OR IS IT ABOUT SOMETHING DIFFERENT?</p> <p>9 THANK YOU.</p> <p>10 THE COURT: LADIES AND GENTLEMEN, WE ARE</p> <p>11 GOING TO RECESS UNTIL TOMORROW MORNING. WE STILL HAVE</p> <p>12 TO HEAR FROM ONE DEFENSE ATTORNEY AND THEN WE HEAR FROM</p> <p>13 MR. SUPLEE AND THEN, AFTER THAT, I WILL GIVE YOU</p> <p>14 INSTRUCTIONS AND EXPECT THAT YOU WILL BEGIN YOUR</p> <p>15 DELIBERATIONS TOMORROW. LET'S HOPE THE SNOW HOLDS OFF.</p> <p>16 IT'S NOT SUPPOSED TO SNOW VERY LATE ON TUESDAY NIGHT.</p> <p>17 HAVE A GOOD NIGHT.</p> <p>18 THE CLERK: ALL RISE.</p> <p>19 (JURY OUT.)</p> <p>20 THE COURT: OKAY. YOU MAY BE SEATED. SO</p> <p>21 WE SHOULD BE ABLE TO GET STARTED FIRST THING TOMORROW</p> <p>22 MORNING.</p> <p>23 MR. TILLERY: I'LL BE READY, YOUR HONOR.</p> <p>24 MR. SUPLEE: I'M SORRY. WHAT TIME DID</p> <p>25 YOU SAY?</p>	<p style="text-align: right;">Page 236</p> <p>1 INDEX</p> <p>2 WITNESS DIRECT CROSS REDIRECT RECROSS</p> <p>3 HUBERT PATTERSON</p> <p>4 (DEPOSITION EXCERPTS) 4</p> <p>5 MARKUS ZAHN 10 46</p> <p>6</p> <p>7</p> <p>8 CLOSING ARGUMENTS PAGE</p> <p>9</p> <p>10 BY MR. SUPLEE 125</p> <p>11 BY MS. QUINN 186</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 235</p> <p>1 THE COURT: 9:30.</p> <p>2 MR. SUPLEE: THANK YOU.</p> <p>3 MR. TILLERY: YOUR HONOR, I'M SORRY. I</p> <p>4 NOTICE THE JURY HAD A CALL-IN NUMBER IN THE EVENT THAT</p> <p>5 THERE IS SNOW. I HAVE NOT HEARD THE LATEST REPORTS.</p> <p>6 THE COURT: THEY DO HAVE A CALL-IN</p> <p>7 NUMBER, SO THAT IF THERE IS ANY ISSUE THEY CAN CALL, BUT</p> <p>8 I'M SURE THEY WON'T BE CLOSING THE COURTS. MAYBE</p> <p>9 WEDNESDAY, BUT NOT TOMORROW.</p> <p>10 MR. TILLERY: I DID NOT HEAR THE REPORT</p> <p>11 LATELY.</p> <p>12 THE COURT: HAVE A GOOD NIGHT.</p> <p>13 ALL COUNSEL: THANK YOU, YOUR HONOR.</p> <p>14 (COURT ADJOURNED AT 4:30 PM.)</p> <p>15</p> <p>16 WE CERTIFY THAT THE FOREGOING IS A</p> <p>17 CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE</p> <p>18 ABOVE-ENTITLED MATTER.</p> <p>19</p> <p>20 DATE OFFICIAL COURT REPORTER</p> <p>21</p> <p>22 DATE OFFICIAL COURT REPORTER</p> <p>23</p> <p>24 DATE OFFICIAL COURT REPORTER</p> <p>25</p>	

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF PENNSYLVANIA

3 - - -  
4 CHECKPOINT SYSTEMS, INC. : CIVIL DOCKET FOR CASE  
5 -vs- : NO. 2:01-CV-02223-PBT  
6 ALL-TAG SECURITY S.A. :  
7 - - -

8 Philadelphia, Pa.

9 January 15, 2009

10 BEFORE HONORABLE PETRESE B. TUCKER

11 ORAL ARGUMENT

12  
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1 refusal to produce any opinions of its legal or  
2 technical advisers, whereas, here, the good faith  
3 basis of the party's actions is at issue. That's  
4 the case of SGS Thompson Microelectronics versus  
5 International Rectifier.

6 Your Honor, as we explained in our  
7 brief, this case is positively a cornucopia of bad  
8 faith, justifying exceptional case find. Not only  
9 did Checkpoint, one, fail to compare the actual  
10 accused product of any actual defendant to the  
11 claims of the patent; two, Checkpoint failed to  
12 secure a valid written opinion from a competent U.S.  
13 patent counsel to support its claim; three, it was  
14 found guilty of enactable conduct latches, which  
15 alone under the law we cited is sufficient to make  
16 the case exceptional; and, four, last but certainly  
17 not least, it used this meritless patent litigation  
18 for anticompetitive purposes. This is truer the  
19 perfect storm of a Section 285 exceptional case.

20 Finally, Your Honor, Defendants seek  
21 only fees and costs they actually incurred in being  
22 required to defend this meritless, useless patent  
23 case. We do not here, as we could under the law,  
24 seek enhanced fees. All we want to do is get our  
25 head above water and be recompensed for what we had

1 litigation when the patentee did not even compare  
2 the accused product, the patent claim to the accused  
3 product.

4 Your Honor, we say, as a matter of law,  
5 that failure renders this case exceptional. But if  
6 you look at the conduct of Checkpoint throughout  
7 this trial, there are other basis in conjunction  
8 with that that call for a finding of an exceptional  
9 case. I will touch on those briefly.

10 The issue of equitable and estoppel.  
11 That jury came back with an advisory finding that  
12 their patent was unenforceable. All-Tag raised that  
13 issue at the beginning of this lawsuit, and  
14 Checkpoint was well aware of it throughout.  
15 Checkpoint never provided All-Tag at any time of any  
16 written opinion or any allegation infringement.  
17 There was one oral statement in '97, and after that  
18 there was nothing.

19 After '97, All-Tag continued to invest  
20 money. Mr. Blieck and Mr. Boels, as they testified,  
21 put 6- to \$7 million of their own money into the  
22 company. They said they wouldn't do that if they  
23 thought they were going to be sued. They opened  
24 All-Tag in October 2000. They wouldn't have done  
25 that if they thought they were going to be sued.

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I CERTIFY THAT THE FOREGOING IS A  
CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN  
THE ABOVE-ENTITLED MATTER.

DATE OFFICIAL COURT REPORTER